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In The

Supreme Court of the United States

AMERICAN FAMILY ASSOCIATION, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the FCC's new point system for selecting among competing applicants for noncommercial educational broadcast licenses is unconstitutional, both on its face, because it systematically discriminates against religious networks in favor of government-funded networks such as NPR and PBS, and as applied, because the results of its retroactive application are inevitable?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The undersigned counsel of record, on behalf of petitioner, American Family Association, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled proceeding.

OPINIONS BELOW

The opinion for the court of appeals (App. 1) is published at 365 F.3d 1156 (D.C. Cir. 2004). The opinion and orders of the Federal Communications Commission are reported at 15 FCC Rcd 7386 (2000) (App. 115), affirmed on rehearing, 16 FCC Rcd 5074 (2001) (App. 32).

JURISDICTION

The order of the court of appeals denying petition for rehearing was entered on July 20, 2004. App. 219. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

1. The First Amendment to the United States Constitution states in full:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

> or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

2. The Fifth Amendment due process clause provides in pertinent part:

> . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . .

U.S. CONST. amend. V.

STATEMENT OF THE CASE

This is a challenge to the FCC's new point system to select among competing applicants for noncommercial educational FM ("NCE FM") radio stations and educational television stations on the grounds that the new system is unconstitutional both on its face and as applied.

The vast majority of NCE broadcasters fall into one of two categories: Government-funded stations, most of which are affiliates of National Public Radio ("NPR"), or religious stations, most of which belong to a Christian network ("religious networks"). Other than NPR, all large national chains of NCE radio stations are evangelical Christian networks. *See* BROADCASTING & CABLE YEARBOOK 2002-2003, pp. A2-A28 (Reed Elsevier, Inc., Newton, MA 2002).

A. Development of the noncommercial band.

During the developmental stages of the NCE FM reserved band, Christian stations were not permitted, and NPR rapidly grew to be the dominant voice on the air. By 1978, when the Commission finally allowed the first Christian station, NPR stations already occupied most of the available frequencies on the reserved band in major cities. Today, the NPR network's 750 stations reach 91% of the population, and every American city with a population of 95,000 or more. *See* Blaine Hardin, *Religious and Public Stations Battle for Share of the Dial,* NEW YORK TIMES, Sept. 13, 2002, at A1.[1]

In sharp contrast to the government-funded NPR and PBS networks, AFA controls the largest privately funded religious network, with some 116 full power and 65 translator stations. But AFA's market share is only 3.8%, because its stations are located in mostly rural settings with a much smaller population.[2]

Prior to 2000, the FCC had awarded licenses for new stations among competing applicants by means of individual hearings. But the Commission later determined this system defective, employing a "'vague standard [that] may [have made] rational choices among noncommercial applicants difficult, if not impossible.'" App. 4 (quoting *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664, 2669 (1992)).

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[1] Similarly, PBS reaches 99% of American homes with televisions. *See* www.pbs.org/aboutpbs.

[2] *See* App. 226, First Amended Petition for Review at ¶ 14.

In 1994, the FCC abandoned its comparative criteria for choosing between mutually exclusive applicants for new NCE stations, and a backlog of applications began to accumulate. By 2000, applications had been filed for nearly every NCE frequency that covered a population of 50,000 or more. The log jam for new NCE television stations reached 67 competing applications for thirty (30) available stations, while the number of applications for 615 potential new NCE radio stations grew to 1,369.

Among NCE stations, few have their own news department, and only a handful offer anything in the nature of national news and editorial comment. NPR looms as a giant among pygmies in this field, supplying news and editorial programming from its Washington headquarters to virtually every NPR affiliate in their network. App. 8. Local programming on university-owned NPR stations consists almost exclusively in jazz or classical musical offerings.

Among religious networks, very few offer their own news and analysis. AFA is an exception, supplying news and commentary from a distinctly Christian perspective. While its eight (8) full-time employees, and lone White House correspondent are no match for NPR's five news bureaus and 17 offices, it does offer genuine diversity in both viewpoint and content. Local AFA stations offer some local programming, too, usually consisting in public service announcements or discussion of local news and events.

B. The new point system.

In 2000, the FCC adopted a new point system for allocating NCE licenses. The applicant with the most points is awarded the license.

The system awards points as follows:

- two points for "local diversity of ownership";
- one to two points for the "best technical proposal";
- three points for "established local entities"; and
- two points for status as a "state-wide educational network," but only for a network that does not qualify for diversity-of-ownership points.

App. 5 (quoting 47 C.F.R. § 73.7003).

The largest and often determinative criterion is the "established local entities," which receive three (3) points of the possible seven (7) total. By definition, government entities are considered "local" wherever their authority extends. For other entities to qualify, they must have been "local" continuously for two (2) years, being physically headquartered or having 75% of its board members residing within 25 miles of the community to be served. 47 C.F.R. § 73.7000. The diversity of ownership criterion favors applicants who do not own or control another station near the area the new license will serve. Control of another station is "attributable" to an applicant whenever the applicant both provides a third of the equity or debt of the station and more than 15 percent of the weekly

programming (or has an ownership interest in the other station). *Id.*

In its Order, the Commission assured NPR and PBS that its new attribution rules would "not have any impact on" them. App. 176.

> We believe that this method of attribution is compatible with and should not have any impact on traditional NCE funding and programming relationships, because traditional sources of NCE funding (*such as the Corporation for Public Broadcasting*, financial institutions, and major donors) or of NCE programming, (*such as the Public Broadcasting Service*) are not generally licensees and thus will have no broadcast interests to attribute.

Id. (emphasis added).

C. Results of the new point system.

Under the new point system, AFA and other religious networks lose to NPR and its affiliates virtually every time. In effect, the new point system shines a flood light on AFA and religious broadcasters, and renders NPR all but invisible. Consequently, an NPR affiliate such as a state university will win against a religious network such as AFA, even when the religious network has *no* station near the community to be served by the new license and the NPR network *blankets the entire region* several times over.

For example, in Iowa, AFA is currently heard on only two small translator stations, while NPR has twelve (12) large stations reaching every square inch of the state. Nonetheless, government-owned NPR affiliates have filed

mutually exclusive applications on 11 of AFA's thirteen (13) applications for new licenses (the other two are blocked by non-NPR stations), and in *every case* the NPR affiliate will win the license. *See* App. 263. In Perry, Iowa, AFA has filed for its first station there. Three different NPR affiliates (all state universities) already broadcast to Perry, one of which is Iowa State University. Notwithstanding, AFA will lose the license to Iowa State, even though Iowa State certified that it would run *the very same programming* it already airs in Perry on its new station. App. 269.[3]

The Commission's new attribution rules make all of the stations for which AFA and other privately-funded religious networks supply programming attributable to them, but none of the stations to which the government-funded NPR and PBS supply programming attributable to them. As the Commission well knew when fashioning the rules, private religious networks are almost wholly funded by its listeners, not the taxpayers and large foundations. New stations are funded almost exclusively by existing listeners, not the recipients of the new station. As such, the religious networks like AFA are of necessity centralized in their structure, and hold all the licenses.[4]

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[3] The Commission required all applicants to calculate their points under the new system and submit the results to it. AFA has analyzed its applications, and determined that in Perry, Iowa State would receive two (2) points for being part of a statewide network, and three (3) points for "localism" because it is a government entity. AFA would receive two (2) points for diversity. Neither applicant would receive points for technical superiority because the proposed coverage areas are identical.

[4] Similarly, under the tie breaker rules, NPR affiliates again win against religious affiliates, because the attribution rules effectively penalize the religious networks.

NPR and PBS, on the other hand, are funded in large measure by the taxpayers.[5] Listener support pays only a small portion of programming costs. In addition, NPR station licenses are generally held by state colleges or universities, which instantly receive the three (3) points for localism, regardless of how many other stations they already own. The loose structure of the NPR network, whereby universities hold the licenses and NPR supplies the programming, is made possible only because the government subsidizes their operations.

The Commission refused to permit applicants an opportunity to restructure to meet its newly-devised criteria, and in any event the definition of "established local entities" requires that they be "local" for two years before qualifying for this credit. The new point system thus exploits the structural disparity between religious networks such as AFA and government-funded networks such as NPR and penalizes the religious networks.

REASONS FOR GRANTING THE WRIT

This case presents an issue of overriding importance affecting the First Amendment rights of millions of Americans to receive news and information from a diversity of viewpoints, because it concerns the allocation of new licenses within the noncommercial educational broadcast spectrum. The FCC's new point system for deciding among competing applicants for new licenses fundamentally

[5] *See, e.g.*, www.cpb.org/about/funding/whopays.html (showing that tax support provides over 39% of the funding for NPR and PBS stations, and businesses and foundations provide about 33%).

alters the allocation of licenses in a manner that denies religious broadcasters a fair and equal opportunity to compete for new stations, in effect conferring a monopoly on government-funded networks such as NPR and PBS, which already enjoy an enormous advantage in market share.

Due to the manner in which agency regulations are reviewed, it is virtually impossible for an FCC regulation of this magnitude to result in a split in the Circuits. Agency regulations are almost always reviewed only in the District of Columbia Circuit. Therefore, the traditional basis for granting a writ of certiorari due to a split in the circuits is generally not applicable in cases such as this.

ARGUMENT

I. THE NEW POINT SYSTEM DISCRIMINATES AGAINST RELIGIOUS BROADCASTERS.

A. The Lower Court Erred by Overlooking the Result-Oriented Nature of the New Point System.

The lower court upheld the new point system on grounds that it was a content-neutral, rational regulation of mere structural components, "involving the 'where' and 'when' of broadcasting.'" App. 23. In fact, it is nothing of the sort. The new point system governs not merely the 'where' or 'when' of broadcasting, but 'whether' one may broadcast at all. The new rules are fundamental to the entire NCE band, serving as gatekeepers to the marketplace of noncommercial ideas.

The lower court overlooked the fact that the new rules were fashioned for retroactive application while the hundreds of mutually exclusive applications were frozen in place before the Commission. As such, the rules were result-oriented; they were carefully crafted to ensure precisely the outcome among the competing applicants they have produced, namely, the award of new licenses to government-funded NPR and PBS affiliates over privately-funded religious networks such as AFA.

As the court noted, NPR, CPB (the corporation for public broadcasting, which funds both NPR and its affiliates in most instances) and PBS do not hold licenses. Instead, local affiliates hold the licenses. App. 8. Most NPR affiliates are state colleges or universities, which meet the criteria for established local entities and thus obtain three (3) points for localism under the new rules. *See, e.g., Federal Communications Comm'n v. League of Women Voters*, 468 U.S. 364, 393 n.22, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984) (noting that over two-thirds of the public television stations are licensed to public educational organizations).

The content and weighting of the point system were plainly designed to capitalize on this difference in order to confer a preference for these government-funded applicants, which already enjoy an overwhelming dominance of the market share, while crippling religious networks such as AFA. In short, the new standards constitute impermissible religious gerrymandering.[6]

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[6] Although AFA is involved only in radio broadcasting, a similar result attains in the field of television, as shown by the experience of

(Continued on following page)

As this Court has often observed, the public welfare is best served by "the widest possible dissemination of information from diverse and antagonistic sources." *Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 192, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (*Turner II*) (internal quotations and citations omitted). The goal of public broadcasting is not, as the Commission asserted here and the lower court accepted, "diversity in the *selection* of programming." App. 29 (emphasis added).

It is diversity in *information* and *viewpoint* that is crucial to the First Amendment, not selection per se. *See, e.g., Joseph v. FCC*, 404 F.2d 207, 211 (D.C. Cir. 1968) ("The public welfare requires the Commission to provide the widest possible dissemination of information from diverse and antagonistic sources and to guard against undue concentration of control of communications power.") (internal quotation marks and citations omitted); *see also Biennial Review Report*, FCC 00-191 (2000) ("in a participatory democracy, it is vitally important that we encourage the widest possible dissemination of this [news and pubic affairs] information from diverse and antagonistic sources") (statement of then-Chairman Kennard). There is no diversity among NPR news outlets, and certainly no antagonism.

The new rules are antithetical to this goal: rather than increasing the diversity of *voices* and *viewpoints* in a community, the new rules stifle diversity of voices, and ensure that the *same* NPR voice is heard from a diversity

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Community Television, Inc., which joined AFA below in petitioning for review of the FCC's Order but is not a party to this petition.

of outlets. But uniformity of viewpoint from a multitude of outlets is still uniformity.

The new point system thus tilts heavily in favor of NPR's structure and so in favor of NPR and its programming. It therefore constitutes a speaker-based regulation, and strongly suggests a government preference for NPR's secular programming as well.

The lower court dismissed AFA's arguments, and found the preference for having the licenses controlled locally rational, without regard to whether local programming was actually offered. App. 11.[7] The lower court accepted the Commission's assertion that "local entities best understand the educational needs of, and are accountable to, their communities." *Id.* While the importance of local control in the early years of NCE radio cannot be questioned, in contemporary America it is no longer axiomatic. In fact, as the actual practices of NPR stations all over America clearly show, local control is almost a non-factor today. Tune in to any NPR affiliate in the country in the morning hours, and you will hear "All Things Considered." Similarly, the news and commentary will be that produced by NPR's national headquarters.[8] Apparently the local board members of NPR affiliates all over the country

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[7] In fact, the Commission squarely rejected the suggestion of credit for locally originated programming.

[8] *See, e.g.*, http://kuniradio.org/kuwaag.html (web site of NPR affiliate KUNI in Cedar Falls, Iowa); http://radiokansas.org/news.cfm (web site of NPR affiliate in Kansas); and www.wkyufm.org/programs.html (web site of NPR affiliates WKPB, WKYU, WDCL, and WKUE, of Western Kentucky University), all of which confirm that they regularly air NPR national news.

unanimously find that NPR's national news and information services are best for their communities, regardless of regional peculiarities and preferences.

Instead of fashioning rules calculated to level the uneven playing field in NCE broadcasting between the behemoths of NPR and PBS on the one hand and struggling religious networks like AFA on the other, the FCC devised its attribution rules in such a way that AFA and religious broadcasters, which had the largest number of *stations*, would be ensnared, while NPR and PBS, with the overwhelming advantage in numbers of *listeners*, would be ignored.

The inexorable effect of the new point system is to ensure that NPR affiliates, which already saturate the market, receive most of the new licenses, and, when they do not, only the smallest and weakest private entities obtain a license. The Commission has thus employed a "divide and conquer" strategy to thwart the growth of the already-handicapped religious broadcasters.

B. The New Point System Perpetuates a Tradition of FCC Discrimination Against Religious Broadcasters.

The lower court ignored the evidence of the Commission's long history of discriminating against religious speakers. This historical prejudice informs the issue of the design and effect of the new point system. The Chairman of the FCC himself noted the systemic denigration of religious broadcasters over the history of the Commission. *See Moody Bible Institute of Chicago*, 66 FCC 2d 162, 163-168 (1977) (from its inception in 1938 until 1977, the FCC practiced "invidious discrimination" against religious

organizations, totally barring them from holding NCE FM licenses, unless the Commission was satisfied that their educational purposes were "primarily secular.") (Chairman Wiley, concurring). While the Commission was "quite liberal" in licensing secular broadcasters, observed Chairman Wiley, religious broadcasters were not permitted to operate in the reserved band at all. *Id.* at 163. Not until 1973, and then only because the religious applicant operated a school, did the Commission grudgingly concede that a religious broadcaster qualified as an "educational" applicant entitled to an NCE license. *Id.* (*citing Pensacola Christian School, Inc.*, 41 FCC 2d 74 (1973)).

More recently, in *WQED Pittsburgh and Cornerstone Television, Inc.*, 19 CR 214 (1999), the Commission offered "additional guidance" to religious broadcasters. The Commission declared that religious programming "would not qualify" as "educational programming." *Id.* at ¶ 44. The Commission steadfastly refused to disavow its narrow and prejudicial construction of what constitutes "general educational programming" under the rules, *id.* at n.81, despite a strong public outcry. Indeed, the United States House of Representatives found the Commission's actions in *Cornerstone* to constitute the imposition of "content-based programming requirements" contrary to the First Amendment rights of religious broadcasters. *See* H.R. 4201, 106th Cong., 2d Sess. (2000). Even after this extraordinary action, then-Commissioner Tristani asserted: "I, for one, will continue to cast my vote in accordance with the views expressed in the additional guidance." *Order on Reconsideration*, 19 CR 241 (2000).

The Commission's bias against religious programming permeates the new point system, and underscores the need for this Court's review. Indeed, it is largely as a

result of this history of discrimination against religious broadcasters that the government-funded networks such as NPR and PBS garnered a corner on the market in NCE broadcasting in the first place.

II. THE LOWER COURT ERRONEOUSLY APPLIED RATIONAL BASIS REVIEW.

A. The New Point System Infringes Free Speech.

The Commission's stated purpose in promulgating the new point system "was, among other things, to promote a diversity of views." App. 24. It does nothing of the sort, stifling all views but those of the NPR and PBS networks.

The Commission's new point system constitutes an official government preference for certain types of speech, such as formal lecture-type instruction from a secular perspective over more informal, religious programs. The rules also reflect favoritism for a certain editorial viewpoint, namely the NPR government-funded viewpoint, over the viewpoint expressed by privately-funded religious networks such as AFA. In this sense, the new rules abridge AFA's free speech rights because they suppress AFA's disfavored speech by thwarting its efforts to expand its market and offer a truly diverse viewpoint while aggrandizing favored NPR speakers and awarding them duplicate stations in markets they are already in.[9]

[9] The new rules also infringe AFA's rights to the free exercise of religion and of free press.

The message is clear: Religious speech is disfavored speech. But the First Amendment does not permit the relegating of certain viewpoints to a lesser status. As Justice Stevens observed,

> A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press.' A regulation that denies one group of persons the right to address a selected audience on 'controversial issues of public policy' is plainly such a regulation.

Consolidated Edison Co. v. Public Service Comm'n of N.Y., 447 U.S. 530, 546, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) (Stevens, J., concurring in judgment); *accord, League of Women Voters, supra*, 468 U.S. at 383-384.

In broadcasting, of course, it is "the people as a whole [who] retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 390.

This right of the people to receive news and information from a diversity of viewpoints necessarily entails a corresponding right to "'access to a wider diversity of information sources.'" *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (quoting H. R. CONF. REP. NO. 97-765, 43 (1982)); *see also id.* ("the diversity of views and information on the airwaves serves important First Amendment values"). The

Commission's new rules deny access to truly diverse voices, and enshrine NPR and PBS as monopolies.

Moreover, the consolidation of power over the dissemination of ideas in the hands of NPR and PBS has an enormous impact on the entire nation. Such monopolization is one of the primary evils the First Amendment was intended to guard against: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Monopolization is a social evil when it is by a private licensee; when it is by the government, it is anathema.

B. Under any Standard of Review, the New Point System is Unconstitutional.

There is some confusion among the circuits as to the appropriate standard of review in cases affecting broadcast rights. *See, e.g., Ruggiero v. FCC*, 317 F.3d 239, 243 (D.C. Cir. 2003) (en banc) (applying "heightened rational basis scrutiny" to character qualification provision); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 402 (3d Cir. 2004) (applying rational basis review to common ownership provision); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 168 (D.C. Cir. 2002) (noting that "more than minimal scrutiny may be required when a class of broadcasters is singled out"); *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 05 (D.C. Cir. 1988) (applying more "than 'minimal scrutiny' ").

The lower court applied minimal rational basis scrutiny. It reasoned that the new rules are nothing more than "structural" regulations of the broadcast spectrum, which are routinely subjected only to rational basis review. App. 23 (citing *Ruggiero, supra*, 317 F.3d at 243).[10] In fact, however, even the *Ruggiero* court applied a heightened standard of review (so-called "heightened rational basis scrutiny"). *Id.* Moreover, as shown above, the regulations here go to the very heart of broadcasting, and although they employ a structural component as a means, because they are being applied retroactively, their immediate effect is to finally determine allocation of a vast number of licenses for new NCE stations all over the nation.

The regulations here should be subjected at least to the intermediate scrutiny of *League of Women Voters, supra*. AFA's claims "lie at the intersection of the First Amendment's protection of free speech [and free exercise and free press] and the Equal Protection Clause's requirement that government afford similar treatment to similarly situated persons." *News America, supra*, 844 F.2d at 804 (calling for test "more stringent than [] 'minimum rationality'"). But intermediate scrutiny is appropriate only when the regulations are content-*neutral*. Here, given that the new point system was crafted with full knowledge of the characteristics of the various applicants and their programming, it must be assumed that they were intended to operate just as they do. That is, they are content-based.

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[10] The lower court also noted that regulation of the broadcast spectrum has traditionally received deferential review due to the scarcity of frequencies within the spectrum. *Id.* AFA challenges this rationale as antiquated and inconsistent with the reality of modern broadcasting. The lower court did not address this argument, deeming it the province of this Court. *Id.*

The regulations are also speaker-based, giving preferential treatment to NPR and PBS. Accordingly, they should be reviewed under strict scrutiny. *See, e.g., Turner Broadcasting System, Inc. v. FCC* (*Turner I*), 512 U.S. 622, 642, 129 L.Ed.2d 497, 114 S.Ct. 2445 (1994) ("speaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say.").

Under any level of scrutiny, the new point system is unconstitutional. It does not advance governmental interests unrelated to the suppression of speech. Rather, the new point system was intended to suppress speech. Additionally, even if *arguendo* the point system was not designed to suppress speech, it still fails review, because it unnecessarily burdens a significant amount of speech, namely the speech of religious networks, which lose each and every time they compete against the government-funded NPR network.

The lower court found that ample alternative avenues of communication remain for AFA and other religious broadcasters. App. 28-29. The facts, however, are otherwise. The court suggested that religious organizations could offer their religious programming to NPR and PBS, for example. *Id.* Since the vast majority of NPR affiliates are government-owned universities, they *cannot*, consistent with the constraints of the Establishment Clause, air quintessentially religious programming. And because the rules are retroactive, AFA and the other religious broadcasters cannot amend their applications or salvage any of the hundreds of lost license opportunities now unalterably determined absent this Court's intervention.

III. THE LOWER COURT ERRED BY REFUSING EVEN TO CONSIDER AFA'S "AS APPLIED" CLAIMS.

In upholding the regulations, the lower court declined to consider AFA's arguments against the attribution rules or AFA's "as applied" constitutional challenge. The court found that no party had raised the issue of the propriety of the new attribution rules under the arbitrary and capricious standard before the Commission, and that accordingly, the issue was waived on appeal. Furthermore, the court apparently overlooked AFA's *constitutional* challenge to the attribution rules, for which there is no prerequisite that the issue first be raised before the Commission. AFA petitioned for rehearing on this issue, but the court denied it without comment.[11]

A. The Attribution Rules Were Targeted by AFA and Undergird its Entire Case.

In many respects, the new attribution rules are the lynchpin of AFA's case. It is by means of them that NPR and PBS are rendered invisible for purposes of the new rules, and it is through them that AFA and the other religious broadcasters are demoted to second-class applicants. But the lower court refused even to consider AFA's challenge to these rules.

In the Order, the FCC spoke directly to the NPR and PBS networks, albeit sometimes in code. The Commission assured the "small local educators" (read "NPR affiliates") that they would be protected against "large national

[11] AFA also argued that the statutory challenge had been preserved, but does not re-urge that argument here.

chains" (read "religious broadcasters"). App. 171. In fact, as the lower court recognized, the "large national chains" consist solely of religious broadcasters, which make up the eight (8) largest chains in the country. The Commission went on to assure NPR that the new attribution rules would not adversely impact NPR and PBS.

Despite these express assurances, and the Commission's tacit admission that it formulated the new rules to accommodate NPR and PBS, the lower court found them "'not content related.'" App. 23 (quoting *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 801 (1978)). The court also found that "[n]othing on the face of the point system inherently favors nonreligious speakers." App. 24. This is true only if one ignores the parenthetical comment to NPR and PBS[12], and the fact that "large national chains" means "religious broadcasters." But the court is not free to ignore these truths: Courts "must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

Furthermore, the Commission prohibited any amendments to the existing applications, thereby making the result of applying the new rules a foregone conclusion.

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[12] "We believe that this method of attribution is compatible with and *should not have any impact on traditional NCE funding and programming relationships*, because traditional sources of NCE funding (*such as the Corporation for Public Broadcasting*, financial institutions, and major donors) or of NCE programming, (*such as the Public Broadcasting Service*) are not generally licensees and thus will have no broadcast interests to attribute." App. 176 (¶ 79 of Memorandum Opinion and Order) (emphasis added).

Nevertheless, the lower court refused to consider AFA's "as applied" constitutional challenges, stating that AFA could raise them *after* denial of their application. App. 22. The court thereby erred. It acknowledged that AFA had raised as applied claims, but simply chose not to decide them.

B. There is no Valid Reason to Delay Consideration of the "As Applied" Claims.

Refusing to decide the as applied claims under these circumstances is akin to refusing to declare an individual dead simply because the coroner is withholding the death certificate while the corpse rots in the street.[13] It ignores reality and elevates form over substance.

The lower court deferred to the Commission's "predictive judgment" to uphold the new rules. *See, e.g.*, App. 16. But such rationale is inapplicable where, as here, the new rules are to be applied retroactively, and will instantly result in allocation of almost all remaining licenses for communities with a population of over 50,000. The lion's share of untapped NCE band frequencies are bound up in the mutually exclusive applications here at issue. To retroactively allocate those almost-extinct unrenewable resources on the basis of rules created out of thin air is purely arbitrary and discriminatory.

Further, ruling on the competing applications is wholly within the FCC's control; the new rules were

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[13] The lower court's ruling is in conflict with the rule whereby one whose First Amendment rights are infringed by threat of arrest need not wait until actually arrested before filing his constitutional claims. *See, e.g., Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1215-1216, 39 L.Ed.2d 505 (1974).

adopted four years ago in 2000. The Commission should not be rewarded for its dilatory actions in finalizing what it has unalterably decreed.

Just as the court in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), carefully evaluated the predictive judgment of the Commission (and declared the integration policy arbitrary and capricious), so this Court should carefully consider the assertions of the Commission here. In fact, *Bechtel* also involved a structural regulation, yet the court there did not hesitate to put it to the test.

In the same way, this Court should not hesitate to consider the sure outcome of application of the new point system to AFA, and thereby prevent irreparable harm and virtual chaos which would result if AFA is required to wait until formal resolution of every one of its numerous applications is denied by the Commission.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 18, 2003 Decided May 11, 2004

No. 00-1310

AMERICAN FAMILY ASSOCIATION, INC.,
PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
RESPONDENTS.

NATIONAL PUBLIC RADIO, INC. AND
ASSOCIATION OF PUBLIC TELEVISION STATIONS,
INTERVENORS.

Consolidated with
00-1479, 01-1222

On Petitions for Review of Orders of the
Federal Communications Commission

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Stephen M. Crampton argued the cause for petitioners American Family Association, Inc. and Community Television, Inc. With him on the briefs were *Patrick J. Vaughn, Brian Fahling, Michael J. DePrimo*, and *Gene A. Bechtel.*

Ernest T. Sanchez argued the cause for petitioner State of Oregon. With him on the briefs was *Susan M. Jenkins.*

C. Grey Pash, Jr., Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were *R. Hewitt Pate*, Acting Assistant Attorney General, U.S. Department of Justice, *Robert B. Nicholson* and *Robert J. Wiggers*, Attorneys, *John A. Rogovin*, General Counsel, Federal Communications Commission, and *Daniel M. Armstrong*, Associate General Counsel.

Lonna M. Thompson, Neal A. Jackson, Gregory A. Lewis, and *Michelle M. Shanahan* were on the brief for intervenors. *Marilyn Mohrman-Gillis* entered an appearance.

Angela J. Campbell and *Jeffrey M. Karp* were on the brief for *amicus curiae* Office of Communication of the United Church of Christ, Inc. in support of respondents.

Before: SENTELLE, HENDERSON and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: These consolidated petitions for review challenge the Federal Communication Commission's ("FCC") new system for allocating noncommercial educational ("NCE") broadcast licenses among

competing applicants. This system allocates the licenses primarily by awarding "points" to each applicant based on several criteria; the applicant with the highest number of points presumptively is awarded the license. The FCC promulgated the system by order after a notice-and-comment proceeding, *In re Reexamination of the Comparative Standards for Noncommercial Educational Applicants,* 15 FCC Rcd 7386 (2000), *vacated in part, Nat'l Pub. Radio, Inc. v. FCC,* 254 F.3d 226 (D.C. Cir. 2001) ("*Order*"), and affirmed the rule on rehearing, *In re Reexamination of the Comparative Standards for Noncommercial Educational Applicants,* 16 FCC Rcd 5074 (2001) ("*Reh'g Order*").

Petitioner American Family Association, Inc., ("AFA") a national Christian ministry that owns and operates 113 NCE stations, claims that the new criteria for allocating such licenses systematically discriminate against religious national broadcasting networks and are thereby unconstitutional. AFA also says that the FCC irrationally justified the point system, making it arbitrary and capricious. Petitioner Community Television, Inc., an NCE licensee based in Atlanta, Georgia, produces secular and religious programming and joins AFA's claims. Separately, the state of Oregon asserts that, for different reasons, the criteria are irrational and exceed the FCC's authority under the Telecommunications Act. We reject all of petitioners' contentions and deny the petitions.

I. Background

A. The Point System

Petitioners' claims concern the process the FCC has adopted for the allocation of NCE broadcast licenses. NCE licenses confer on license holders the exclusive right to

broadcast on television and FM radio frequencies that the FCC has set aside exclusively for noncommercial educational use. About twenty percent of total channels and frequencies have been so reserved.

The new system at issue in this case arose from the FCC's decision, in the late 1990s, to change the way it allocates these licenses. The old system allocated them via individualized FCC hearings that selected among competitors based on what was, in the FCC's words, a "vague standard [that] may [have made] rational choices among noncommercial applicants difficult, if not impossible." *Reexamination of the Policy Statement on Comparative Broadcast Hearings,* 7 FCC Rcd 2664, 2669 (1992). In 1998, the FCC gave notice of and invited comment on a proposal to implement a new system that would allocate NCE licenses based on more objective criteria. *See In re Reexamination of the Comparative Standards for Noncommercial Educational Applicants,* 13 FCC Rcd 21167 (1998).

After receiving comments, the FCC eventually adopted a new point system for allocating NCE licenses. As between qualified applicants who seek the same license, the system presumptively awards the license to the applicant with the greatest number of "points" (subject to some complications not relevant here). 47 C.F.R. § 73.7003(a) (2003). If applicants have the same number of points, the applicant with the fewest existing licenses gets the license. *Id.* § 73.7003(c)(1). If applicants have the same number of points and the same number of existing licenses, the applicant with the fewest outstanding license applications wins. *Id.* § 73.7003(c)(2). To screen out fraudulent claims in applications, the FCC stated that its staff will conduct random audits of applications. *Order*

¶ 89. Also, the FCC will conduct "acceptability studies" for each applicant who has the most points. *Id.* ¶ 90. If an application is deemed unacceptable after investigation, the FCC will return it. Finally, winning applicants must maintain the characteristics for which they received points for at least four years of the eight-year license term. 47 C.F.R. § 73.7005(a). During that period, any entity that buys the station must demonstrate eligibility for the same number of points as the selling applicant had. *Id.*

The system awards points as follows:

- two points for "local diversity of ownership";
- one to two points for the "best technical proposal";
- three points for "established local entities"; and
- two points for status as a "state-wide educational network," but only for a network that does not qualify for diversity-of-ownership points.

Id. § 73.7003.

For any given license, the local diversity-of-ownership criterion favors applicants who do not own or control other stations near the area the license holder will serve. Specifically, an applicant gets two points for diversity of ownership if the applicant has no "attributable" interests in stations with overlapping "principal community contours" (defined as areas covered by a certain broadcast signal strength) and if the applicant's governing documents require that diversity to be maintained. *Id.* § 73.7003(b)(2). The FCC stated that it adopted this criterion to foster broadcast diversity by allowing the local public to be served by different NCE licensees. *E.g., Order* ¶ 29.

An applicant has attributable interests in the licenses it owns and the licenses its owners own. "Ownership interests" are defined in the notes to 47 C.F.R. § 73.3555, the commercial ownership attribution rules. 47 C.F.R. §§ 73.3555(f), 73.7000. For example, a licensee gets no points for diversity if its broadcasting range (appropriately defined) overlaps with another licensee who is owned by the same person or corporation. Also attributable to the applicant is an interest of an entity that both provides a third of the applicant's equity or debt and either provides more than 15 percent of the applicant's weekly programming or has an ownership interest (again as defined by section 73.3555) in the same media market. *Id.* § 73.7000. If an existing licensee, for instance, financed construction of a new station for an applicant, on condition that the applicant air a majority of the existing licensee's programming, the existing licensee's interest would be attributed to the applicant. *See Order* ¶ 79.

Like the diversity criterion, the "established local entities" factor also advantages applicants the FCC deemed would advance the cause of "localism" – the goal of having licenses controlled by people in diverse communities and who are familiar with the community the license covers. Under that factor, entities that have been "local" continuously for two years are considered "established local entities," which entitles them to three points. 47 C.F.R. § 73.7003(b)(1). "Local," in turn, means that the applicant is physically headquartered, has a campus, or has 75% of its board members residing within 25 miles of the community the broadcast license will serve. *Id.* § 73.7000. Government entities are considered "local" wherever those entities' authority extends. *Id.*

The state-wide educational network credit awards two points to certain schools and universities. Educational entities that do not qualify for diversity of ownership points will be awarded two points if they both have authority over at least 50 elementary or secondary schools and provide programming to the schools in furtherance of the schools' curriculum. *Id.* § 73.7003(b)(3). Higher education institutions qualify if they serve at least five full-time campuses and provide programming in furtherance of those campuses' curriculum. *Id.*

The FCC created the state-wide educational network credit to compensate for the inability of large educational networks to qualify for the diversity credit. *See Order* ¶¶ 58-60. That inability arises because large educational networks (for example, state universities) control stations that serve many schools and campuses within a single state. The signals of those stations generally overlap with the areas served by other in-state broadcast licenses. The overlap disqualifies the networks who control these stations from receiving two points for diversity of ownership. This inability, the FCC reasoned, merited awarding such networks two additional points, even though they are, according to the criteria, "nondiverse" for licenses within the existing reach of their networks. *Id.* ¶ 60.

Finally, the system awards points to technically superior applicants. An applicant receives one additional point if its station will cover 10% more area and population than the next technically best applicant's station. 47 C.F.R. § 73.7003(b)(4). An applicant receives two points if its station will cover 25% or more area and population than the next technically best applicant's station. *Id.*

B. The Structure of AFA, NPR, and PBS

National Public Radio ("NPR") is a nonprofit corporation that produces and distributes news to member radio stations. It also licenses news to nonmember stations, many of which are state colleges and universities. Many NPR member stations also are funded by the Corporation for Public Broadcasting, a federally created corporation. The public fisc, however, is not their only source of money. They also receive individual membership dues and federal and local grants. The Public Broadcasting Service ("PBS") functions similarly. It distributes programming to member stations from individual stations that produce the programming (rather than centrally producing the programming itself).

Many public NCE stations are affiliated with NPR and PBS and derive much of their programming from NPR, PBS, and other national sources. For example, the vast majority of public radio stations' weekly news broadcasts, at least as of a few years ago, came from national sources, like NPR, and Public Radio International. NPR-affiliated radio stations broadcast local programming as well. Music programs comprise most of that local content. As for public television, PBS centrally distributes most prime-time public programming, but public television stations also broadcast local programs.

Despite their influence over public television and radio, PBS and NPR themselves hold no broadcast licenses. Licenses are held instead by the individual affiliates. However, the affiliates do exercise some degree of control over NPR's and PBS's operations. NPR and PBS members, for example, elect managers of affiliated stations to serve on NPR's and PBS's board of directors.

Other national networks, like the one run by AFA, are more centralized than PBS and NPR. AFA is a national media network that produces and distributes news from a Christian perspective. Unlike public broadcasting affiliates, AFA and other large national chains own the stations to which they distribute news. AFA also holds the licenses that authorize its stations to broadcast NCE programming. Eight of the largest such centralized national chains, like AFA, are devoted primarily to religious programming.

AFA's centralized structure comparatively disadvantages it under the point system as against NPR's and PBS's decentralized structures. NPR and PBS have no ownership, equity, or lending interests in individual NCE public licensees. They therefore have no "attributable" interest in those stations under the FCC's attribution rules. Religious networks, including AFA, that own their member stations and centrally hold the licenses have attributable ownership interests in the stations they own and in the licenses they hold. For example, if two NPR affiliates that regularly broadcast national NPR programming applied for licenses with overlapping signals, each individual station still would potentially be eligible for the diversity credit for each license. The same would not be true of two overlapping AFA affiliates: AFA's ownership interest in each would be attributed to each affiliate, making the applicants nondiverse and disqualifying them from diversity credit. Similarly, because AFA centrally owns and controls its members, AFA affiliates will not likely qualify for the "established local entities" credit. NPR and PBS affiliates, in contrast, are mostly locally controlled, and are thus more likely to receive points for being established local entities.

Even some public affiliates who are nondiverse will qualify for two additional points under the state-wide educational network credit. Because of their size and educational focuses, the most likely candidates for this credit are state public schools and universities. These institutions already hold many overlapping NCE licenses. Yet institutions that qualify for this credit may receive two additional points even for licenses within their current broadcast reach. Private educational organizations, in contrast, are not as large, and so will not get the credit without dramatically expanding, and only if they do so in one state.

II. Analysis

Petitioners raise both statutory and constitutional challenges to the FCC's rule. We will first deal with the statutory challenges, and because we reject those, next consider the constitutional challenges.

A. Statutory Challenges

Both AFA and Oregon submit that the final rule is arbitrary and capricious. Oregon also claims that the final rule is inconsistent with 47 U.S.C. § 398. Both arguments lack merit.

1. Rationality of the Locality Credit

We reject AFA's claim that the FCC's justification for adopting the three-point credit for established local entities is arbitrary and capricious under the standard set forth in *Motor Vehicle Manufacturers Association v. State Farm Mutual Life Insurance Co.*, 463 U.S. 29, 41-44

(1983). AFA argues that the localism credit is irrational because, as AFA correctly points out, the FCC justified it by analogizing to its instructional television rules, which allocate points to applicants who produce instructional television and FM radio programming, and which also heavily favor local applicants. The analogy between the two, AFA claims, is false: instructional television, for example, is used in school classrooms, whereas NCE broadcasting serves the community at large.

We hold that the FCC's analogy to the instructional television rules is not irrational. The FCC explained that there is a strong tradition of local control in NCE broadcasting, and that local entities best understand the educational needs of, and are accountable to, their communities. *Order* ¶¶ 42-48. The FCC reasoned that "local entities best understand the educational needs and academic standards of their communities[,] and are the best authorities for selecting programming to meet those needs." *Id.* ¶ 46.

NCE broadcasting is analogous to instructional television in that both are educational. It is true, as AFA points out, that NCE broadcasting does not focus solely on *instructional* educational programming, as do the instructional television rules. But it remains true that NCE applicants' broadcast frequencies, as a threshold matter, all must "be used for the advancement of an educational program," 47 C.F.R. 73.503, and so, by definition, are also educational. There is a rational connection between local accountability and education, since it is reasonable to expect that locals are in the best position to judge their own educational needs. That rational connection, together with local entities' strong traditional role in NCE broadcasting, makes the agency's explanation rational.

Oregon mounts three distinct, and equally unpersuasive, challenges to the rationality of the locality credit. As noted above, the locality credit awards three points to "local" applicants. The rule defines a "local" applicant as one physically headquartered in, having a campus in, or having 75% of its board members residing within 25 miles of the center of the community the broadcast license will serve. 47 C.F.R. § 73.7000. Government entities are considered "local" wherever their authority extends. *Id.*

Oregon first faults the FCC for failing to award points for local origination of programming, in addition (or perhaps in lieu of) to the points for local control over programming. We find the FCC's reason for rejecting Oregon's proposal to be rational. The FCC explained that local broadcasters should have the flexibility to broadcast programming regardless of its source, given that NCE stations have a wide audience. *Order* ¶¶ 65-66. That explanation is quite rational. There is no reason to suppose that the supply of NCE programming is coextensive with demand for it in any given local community. In truth, the opposite assumption is plausible: local supply may well be inadequate to meet local demand, given that there are likely, on average, more listeners in any given community than there are content producers. In any event, even if local origination of programming served the needs of local communities well, fostering local control advances that goal also. Given that both options are rational, the FCC's choice of means is well within its discretion.

We also reject Oregon's other reasons for thinking the locality credit arbitrary. Oregon argues that mere local presence, the factor the locality credit rewards, will not ensure that programming will be locally produced. This argument misses the point. As explained above, the FCC

designed its locality credit not to encourage locally produced programming, but rather to reward local control over programming wherever the programming is produced. *Id.* ¶ 66; *Reh'g Order* ¶ 74. The practice of rewarding applicants who are controlled by locals is rationally related to that goal.

Oregon also claims that the FCC's definition of "local" is irrational. Again we disagree. Oregon argues that the 25-mile radius is arbitrary because that criterion does not account for the different geographies of local communities nationwide. But the FCC offered two rational justifications for not individualizing its definition of local. First, the FCC reasoned that doing so would be difficult for applicants to administer. *Reh'g Order* ¶ 50. Second, the FCC justified the radius by analogy to that same definition of local in the instructional television rules. *Order* ¶ 54. For the reasons stated above, the analogy between this rulemaking proceeding and the instructional television rules is rational. We find nothing arbitrary in this chain of reasoning.

Lastly, Oregon attacks the rationality of defining governments to be local wherever their authority extends. It argues that it is irrational to so limit the definition of local, given that the signals of educational broadcasting travel across jurisdictional lines. We once again find no cognizable defect in the FCC's reasoning. The FCC reasoned that local governments are especially accountable to people within their jurisdictions and so will be especially responsive to their needs. *Reh'g Order* ¶ 50. This explanation meshes quite well with the FCC's overarching premise that encouraging local control will ensure local accountability over educational broadcasting; indeed, politicians are probably *more* accountable to voters in their districts

than local broadcasters are to their neighbors. It is true that, unlike the 25-mile radius, this aspect of the definition of local is individualized, and so will be administratively costly. But the FCC addressed this worry as well. It pointed to "recognizable extrinsic factors, such as where a person pays taxes and what school district he lives in," that will ease the administrative difficulties of making this aspect of the definition of local dependent on individualized factors. *Id.* We hold that these justifications are legally adequate.

2. Rationality of the State-wide Educational Credit

AFA also assails the FCC's justification for adopting the state-wide educational network credit. That credit, again, awards two points to certain very large schools and universities that do not qualify for diversity-of-ownership credit but operate in a single state. AFA's argument is that this credit does not advance the cause of broadcast diversity. AFA points out that as a practical matter, the only beneficiaries of the credit will be large state universities, many of which already hold many NCE licenses and offer "a uniform viewpoint[] determined (in most cases) by a distant bureaucracy." AFA Br. at 38. That two-point advantage, the argument goes, negates the edge a truly diverse entity, one who qualifies for the two-point diversity credit, would otherwise have. The state-wide network credit therefore undermines the FCC's stated goal of advancing broadcast diversity, AFA submits.

We do not think AFA's argument carries its high burden of demonstrating that the FCC's justification for the state-wide network credit is on its face arbitrary and capricious. First, the FCC reasoned that large schools are

especially attractive candidates for NCE broadcast licenses, as they "ensure [] that educational programming is available throughout a specific area in a coordinated and organized manner most appropriate to that area, and especially to schools." Therefore, these institutions carry "distinct benefits" even if they do not qualify for the diversity-of-ownership credit. *Order* ¶¶ 56, 58. Second, only large schools should be eligible for the credit, the FCC reasoned, because smaller schools, including private entities, will more easily be eligible for the diversity credit and will not need an extra boost. *Id.* ¶ 60. Third, single-state networks provide more focused educational benefits than do "national and regional" networks, since national and regional networks cannot "set the educational policies of schools or have schools accountable to them." *Id.*

We cannot say that this explanation is arbitrary and capricious on the record before us. As explained above, there is a rational link between NCE broadcasting and educational programming. It is reasonable to assume that educational institutions are in an especially good position to provide educational programming, whether or not that programming is "diverse." It follows that there is a rational basis in providing educational institutions with extra points even if they do not qualify for diversity credit. There is no question that state-wide network credit does that.

The more difficult issue is whether limiting that educational benefit only to educational organizations of a certain size and in a single state – in particular, organizations with a minimum of 50 secondary and elementary schools in a single state or at least five campuses in a single state – is rational. The FCC's explanation for this aspect of the credit, again, relies on two premises: first, its

prediction that smaller educational organizations will easily qualify for the diversity credit; and second, the empirical assumption that multi-state and regional networks "are generally satellite operations of distant stations, without the ability to set educational policies for schools or have schools accountable to them," and therefore as educational providers are inferior to large single-state networks. *Order* ¶ 60.

These assumptions appear rational on the current record. We have no obvious way of verifying the FCC's assertion regarding the general characteristics of multi-state and regional networks. Neither party has directed us to empirical information in the record either verifying or contradicting this assumption. We must defer to the Commission's expert judgment in the absence of record evidence indicating that the Commission's assumption is a clear error of judgment, or a showing that the empirical assumption is facially implausible or inconsistent.

The FCC's predictive judgment that smaller and multi-state educational organizations will more easily qualify for the diversity credit is also on its face rational. It is rational to assume that the credit will capture the distinct, yet (in the FCC's judgment) less educational benefits that flow from favoring such entities, since those entities are less likely to have overlapping signals. If those entities are significantly more likely to be eligible for the diversity credit, then it is rational to assume that this credit will adequately account for those benefits, as the state-wide network credit does for large single-state networks. And because large, single-state educational entities cannot receive the state-wide network credit if they qualify for diversity points, there is less risk of double-counting the extent of those networks' distinct

educational benefits. In sum, the FCC's reasonable assumption that multi-state and regional networks are inferior educational providers, together with the prediction that those entities will typically be eligible for the diversity credit (while state-wide networks who receive the state-wide credit will not), is enough to make the credit nonarbitrary.

We caution, however, that we are not foreclosing any and all future challenges to the rationality of the state-wide network credit – or, for that matter, any aspect of the point system that relies on verifiable empirical predictions or assumptions. The Commission may well have a future obligation to reevalute the point system if the empirical predictions and premises it used to justify the point system turn out to be erroneous. As we have previously noted, the FCC's "necessarily wide latitude to make policy based on predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time to ascertain whether they work – that is, whether they actually produce the benefits the Commission originally predicted they would." *Bechtel v. FCC,* 10 F.3d 875, 880 (D.C. Cir. 1993) (internal quotation marks and citation omitted). For example, experience may establish that, contrary to the FCC's prediction, most multi-state and regional educational institutions will not be able to obtain diversity credits to compensate for the advantage the state-wide educational credit gives large single-state educational organizations. On the present record, however, the Commission's empirical assumptions and predictions are sufficiently rational to survive arbitrary-and-capricious review.

3. Rationality of the Attribution Rules

AFA challenges the rationality of the point system's attribution rules, which we described above. AFA's argument on this score is that the attribution rules arbitrarily favor public broadcasting networks like PBS and NPR over private religious networks like AFA. AFA points out, correctly, that the rules do not attribute control of NPR's and PBS's licensees to NPR and PBS, even though NPR and PBS provide those affiliates with money and programming. In contrast, because AFA and similar organizations own and control their affiliates, the attribution rules treat AFA as a single, large, nonlocal entity.

We do not consider the merits of this challenge because we do not believe that any party raised it with sufficient clarity before the FCC. It is black-letter administrative law that 47 U.S.C. § 405 bars us "from considering any issue of law or fact upon which the Commission has been afforded no opportunity to pass." *AT&T Corp. v. FCC*, 317 F.3d 227, 235 (D.C. Cir. 2003) (internal quotation marks and citation omitted). The FCC argues in its brief that no party to the Commission's proceedings challenged the rationality of the attribution rules. AFA does not respond to this argument in its reply brief. In response to questioning at oral argument, AFA's counsel said that this issue had been raised in comments by the Educational Media Foundation. The Foundation, however, argued that the attribution rules were unconstitutional, not that they were arbitrary and capricious. *Reh'g Order* ¶¶ 15-21. Because the constitutionality of the rules is distinct from its substantive policy rationale, we do not believe that a "reasonable Commission necessarily would have seen [that] question raised before [the Court] as part of the case presented to it," *AT&T Corp.*, 317 F.3d at 235 (internal

quotation marks, emphasis, and citation omitted), simply because the Foundation challenged the constitutionality of the attribution rules. We therefore do not consider the merits of this claim.

4. Rationality of the FCC's System for Screening out Factually Incorrect License Applications

Oregon also takes issue with the FCC's system for verifying that NCE applicants actually have the attributes they claim on their license applications. We reject this challenge as well. Oregon claims, specifically, that the FCC irrationally failed to require NCE applicants to submit documentary evidence of their bona fide NCE status. We hold, once again, that the FCC adequately addressed this concern. The FCC noted that competing applicants have incentives to bring factually incorrect license applications to its attention, which they no doubt do. *Order* ¶¶ 88-89. Also, the Commission said that it will delegate to its staff the task of developing documentation that will verify whether applicants qualify for the points they claim, and that the FCC staff will randomly audit that documentation for compliance. *Id.* Finally, the FCC said that it will conduct "acceptability" studies to determine whether the applicant with the most points is actually eligible. *Id.* ¶ 90. Even if Oregon is correct that these steps are inadequate to the task, that does not change the fact that there is a rational connection between them and the stated problem. The FCC's explanation is not arbitrary.

5. 47 U.S.C. § 398

The final statutory issue we must address is Oregon's argument that the point system conflicts with 47 U.S.C. § 398. That section provides, in pertinent part:

> Nothing contained in this part shall be deemed . . . to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over public telecommunications, . . . or over the curriculum, program of instruction, or personnel of any educational institution, school system, or public telecommunications entity.
>
> . . .
>
> (c) Control over content or distribution of programs. Nothing in this section shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the content or distribution of public telecommunications programs and services, or over the curriculum or program of instruction of any educational institution or school system.

47 U.S.C. § 398(a) & (c).

Oregon argues that the final rule violates this provision because the rule directs "the curriculum [or] program of instruction" of educational institutions by influencing educational content. *Id.* § 398(a). We do not consider this argument on its merits because it was not presented to the Commission below. As Oregon concedes, the proper waiver standard to apply under the law of the circuit is "whether a reasonable Commission *necessarily* would have seen the [§ 398] question raised before us as part of the case presented to it." *Time Warner Entm't Co., L.P. v. FCC,* 144 F.3d 75, 81 (D.C. Cir. 1998) (emphasis in original). The

comments to which Oregon points did not preserve the issue under this standard.

Oregon argues that comments by the Educational Media Foundation and the Station Resource Group raised the question. However, those comments argued only that the FCC's explanation for favoring certain types of educational programming over others was irrational. Station Resource Group Pet. for Recons. at 8; *Order* ¶ 60. They did not mention § 398. Nor could the Commission have obviously inferred from the substance of the comments that § 398 was relevant to the issues they raised. Challenging the way in which the FCC regulates NCE content says nothing about whether the FCC can influence content at all. The FCC therefore had no opportunity to offer a construction of § 398 for our review. We are barred from deciding such issues in this procedural posture.

B. Constitutional Challenges

Having rejected petitioners' statutory challenges, we must next consider their constitutional challenges. AFA claims that the point system is facially unconstitutional under the free speech and free exercise clauses of the First Amendment, and under the equal protection "component" of the Fifth Amendment's due process clause. Although AFA characterizes its argument as an "as-applied" challenge, given that the FCC applied the point system retroactively to licensees' pending applications and did not allow amendments, the substance of AFA's argument makes clear that it is challenging the point system not simply as it applies to the current pool of applicants, but also as it applies to future applicants. As the FCC points out, moreover, the Commission has not yet denied any of

the license applications of AFA's affiliates. Any applicants whose applications are denied can seek review of those denials in this Court, and then have their as-applied claims tested. Therefore, we treat AFA's constitutional case as a facial challenge. We hold that the system facially violates neither the First nor the Fifth Amendment.

1. Free Speech

The first issue is the appropriate standard of review to apply to the point system under the free speech clause of the First Amendment. AFA claims that the point system is content-based, and therefore that strict scrutiny is the appropriate standard of review. AFA's argument is that the point system favors nonreligious speech, like that broadcast on public television and radio stations, over the religious speech carried by AFA's affiliates. Therefore, AFA argues, the point system explicitly prefers some speakers over others. At a minimum, AFA continues, the regulations should be subject to some form of heightened scrutiny. We do not agree, and instead hold that rational basis scrutiny is the proper standard.

A review of the legal principles applicable to the radio and television broadcasting spectrum makes the error of AFA's argument clear. It is well established that content-netural "structural" regulation of the radio and television broadcast spectrum, "that is, [that] involving the 'where' and 'when' of broadcasting," *Ruggiero v. FCC,* 317 F.3d 239, 243 (D.C. Cir. 2003) (en banc), is generally subject only to rational basis scrutiny. *Id.* at 244 (citing *FCC v. National Citizens Comm. for Broad.,* 436 U.S. 775, 802 (1978) (*"NCCB"*)). *See also Sinclair Broad. Group, Inc. v. FCC,* 284 F.3d 148, 167-68 (D.C. Cir. 2002); *Fox Television*

Stations, Inc. v. FCC, 280 F.3d 1027, 1045-46 (D.C. Cir. 2002). The justification for this deferential standard, according to the Supreme Court, lies in the unique physical characteristics of the broadcast medium. Regulation of some form is an irreducible feature of any broadcast spectrum worth having, since "a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public." *NCCB,* 436 U.S. at 798 (citing *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 375-77 (1969)).

This deferential standard is applicable here. The point system governs the structure of all of NCE broadcasting by allocating its scarce spectrum among applicants. It is the quintessential example of a structural regulation "involving the 'where' and 'when' of broadcasting." *Ruggiero,* 317 F.3d at 243. The system is analogous to the cross-ownership rules the Supreme Court subjected to minimal scrutiny in *NCCB*, to the similar cross-ownership rules we subjected to rational basis scrutiny in *Fox Television Stations,* and to the television ownership rules we subjected to minimal scrutiny in *Sinclair Broadcast*. AFA, like several others before it, *see Fox Television Stations,* 280 F.3d at 1045; *Sinclair Broadcasting Group,* 284 F.3d at 168-69, implies that we should discard the scarcity rationale as a relic of the past. AFA Reply Br. at 8-10. We dismiss this argument, as it is fundamental to the rule of law in our court system that "it is not the province of this court to determine when a prior decision of the Supreme Court has outlived its usefulness." *Fox Television Stations,* 280 F.3d at 1046 (citing *Agostini v. Felton,* 521 U.S. 203, 237 (1997)).

Like *NCCB*, *Fox Television,* and *Sinclair Broadcasting*, the present scheme is "not content related." *NCCB,*

436 U.S. at 801; *see also Sinclair Broad.*, 284 F.3d at 168. The FCC's stated purpose in promulgating the point system was, among other things, to promote a diversity of views. The diversity credit does that by advantaging applicants who do not already own licenses in given geographical areas. The localism credit supports the same goal by ensuring that applicants in many different regions have a voice in selecting NCE programming. The attribution rules advance the cause of localism by advantaging truly local stations over affiliates under the control of centralized organizations. Finally, the state-wide educational credit furthers diversity by advantaging educational organizations who might not otherwise have a voice on the radio, just as having an NCE broadcasting spectrum at all diversifies radio and television programming as a whole. Simply put, "[b]y placing a value upon diversity" the FCC "did not necessarily . . . value one speaker, or one type of speech over another; it merely expressed its intention that there continue to be multiple speakers." *Time Warner Entm't Co. v. United States,* 211 F.3d 1313, 1318 (D.C. Cir. 2000). For these reasons, and for the reasons stated above in our discussion of AFA's statutory claims, the point system rationally advances these goals, and thus passes rational basis scrutiny.

AFA argues that the point system is content-based, and therefore is subject to strict scrutiny, in that it "reflects favoritism," AFA Br. at 20, for the secular viewpoints expressed by public radio and television networks over the views broadcast by religious networks. We are somewhat unclear on how AFA has inferred this nefarious motive from the rule. Nothing on the face of the point system inherently favors nonreligious speakers. Organizations are equally eligible for points whether or not they are

religious. Religious groups may be established local entities, may be diverse, and may have superior technical capability. Religious schools, so long as they have five campuses or serve at least 50 elementary or secondary schools, are eligible for the state-wide educational credit on the same footing as state or nonreligious educational networks.

It is true, but irrelevant, that the affiliates of some sorts of nonreligious organizations, like the NPR and PBS networks, are more likely to get licenses than the religious affiliates of centralized organizations like AFA. That preference results only because such public affiliates are more decentralized, and therefore (in the FCC's view) will advance the content-neutral goals identified by the FCC better than the affiliates of centralized organizations like AFA will. As discussed, although NPR and PBS distribute programming to their affiliates, they do not own their affiliates, hold their licenses, or otherwise direct the content their affiliates may broadcast. The same is not true of AFA's network. There is nothing content-based about preferring decentralized broadcasters to centralized ones, given the FCC's motive. Because this case involves no explicit content-based discrimination, AFA's reliance upon *FCC v. League of Women Voters,* 468 U.S. 364, 381-83 (1984), is misplaced. The point system here, "unlike the ban on editorializing at issue in *League of Women Voters,* is not a content-based regulation." *Fox Television Stations,* 280 F.3d at 1046.

Nor is there any evidence from the justification the FCC gave for this scheme that its "manifest purpose [was] to regulate" religious speech "because of the message it conveys." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 645 (1994). As explained above, the FCC justified the

factors the system favors by reference to advancing the goal of diversity. The closest AFA comes to identifying an explicit statement by the Commission evincing an intent to harm religious groups is the Commission's stated desire to prevent "large national chains" from crowding out small local educators. *Order* ¶ 34. That justification, again, is perfectly consistent with advancing the content-neutral goal of localism, and hence diversity.

2. Free Exercise

We also reject AFA's argument that the point system unconstitutionally infringes upon the First Amendment right to free exercise of religion. Citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 534-39 (1993), AFA argues that the system constitutes what the Supreme Court has called an unconstitutional "religious gerrymander." A religious gerrymander is possible when

> the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.

Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring). The unconstitutional gerrymander occurs when the bounds of legislation, like those of a gerrymandered political district, are artfully drawn to exclude the disfavored category – in this case, religious institutions. *Cf. Gomillion v. Lightfoot,* 364 U.S. 339, 341-42 (1960) (involving the gerrymander of city boundaries to exclude black voters). AFA's argument, while not clearly articulated, appears to be that the point system, though facially neutral and justified by reference to benign goals, benefits secular networks like NPR over religious ones to such an

extreme degree that the inference of religious discrimination is plain. We see no such inference.

Employment Division v. Smith, 494 U.S. 872, 879-80 (1990), makes clear that the general rule is that laws and regulations that incidentally burden religion do not violate the free exercise clause. *Id.* at 879-80. However, even facially neutral laws and regulations violate the free exercise clause if in practical effect they target religious faith or speech to an extreme degree, and if those extreme burdens are not related to the legitimate governmental interests served by the regulation. *Church of Lukumi,* 508 U.S. at 534-39.

Church of Lukumi involved local ordinances that outlawed the ritual slaughter of animals. 508 U.S. at 536-38. In practical effect, the prohibitions fell "on Santeria adherents but almost no others." *Id.* at 536. The city defended the ordinance on the ground that the prohibition advanced the city's legitimate interest in protecting public health and preventing cruelty to animals. *Id.* at 538. The Court found that the ordinances were woefully underinclusive to advance those interests, *id.* at 538-40, 543-46, and inferred from this regulatory bluntness that the city's motive in passing the ordinances was to suppress religious belief, *id.* at 547.

The differential impact of the point system on AFA and similar organizations' religion is neither similarly severe and targeted nor so unrelated to the FCC's legitimate regulatory interests as to be a religious gerrymander. Though the point system's focus on localism and diversity no doubt disadvantages AFA and other religious organizations who happen to be centralized, the rule on its face appears also to disadvantage nonreligious centralized

broadcasting networks. Similarly, the state-wide network credit concededly disadvantages AFA and religious educational organizations, but it also disadvantages nonreligious multi-state and regional school systems. It is just not true, therefore, that the burdens of the point system fall on religious organizations "but almost no others." 508 U.S. at 536. This is true even if AFA is correct that the point system prevents AFA from competing effectively with state universities and school systems. In the context of this facial challenge, we cannot say that it is clear on the face of the rule that its burdens are so focused as to burden virtually only religious speech.

Even setting aside that nonreligious organizations also face burdens from the rule, the burden the point system foists on religious organizations is relatively modest. There is nothing inherently related to religion in the point system's criteria. The system favors decentralization and diversity. Although it may be true that many religious NCE broadcasting networks are centralized, nothing inherent in their religious character forces them to structure their networks in this way. If AFA were to free its affiliates from its control, those affiliates could more easily compete with NPR's and PBS's affiliates under the system. A point system so easily turned to the benefit of religious organizations cannot be a religious gerrymander.

The point system, moreover, leaves ample alternative channels for religious speakers to let their voices be heard on the NCE airwaves. The rule does not prevent religious organizations from offering religious programming to NPR and PBS affiliates in competition with NPR and PBS. It does not prevent religious people from speaking on NPR and PBS affiliates, or prevent NPR and PBS from selling

religious programming to their affiliates. If public broadcasting affiliates choose to be secular, or find the programming of NPR and PBS to be superior to AFA's, that is not a feature inherent in the point system; it is inherent, rather, in competition in the free market of ideas. Equally to the point, if NPR and PBS affiliates have a comparative advantage over AFA affiliates by virtue of being government funded, that is the result of a political choice of how to allocate public money. The advantage does not derive from the FCC's rule. If those funding choices make it difficult for AFA affiliates to compete with NPR and PBS affiliates without AFA's financial assistance, the proper way to deal with that consequence of those choices is through the political process through which those choices were made.

Finally, turning to the last *Lukumi* factor, we find that the FCC's legitimate interests reasonably relate to the burden the rule places on religious organizations. AFA claims that the point system does not advance the goal of having diversity of views on the airwaves, because NPR and PBS affiliates predictably will purchase national programming from NPR and PBS. AFA misconceives the FCC's interest. The interest, as noted above, is in advancing diversity in the selection of programming, whatever the source, not in having different varieties of programming per se. That is why, as explained above, the FCC rejected the proposal to award points for local origination of programming. If NPR and PBS affiliates were, for example, to begin purchasing programming primarily from AFA and other centralized religious networks, the rule would equally advance the FCC's legitimate interest in advancing diversity in the selection of programming. Again, nothing in the rule requires NPR and PBS affiliates

to select programming from a uniform source. Any such uniformity results instead from individual choice.

3. Equal Protection

AFA's last constitutional argument is that we should apply some form of "heightened" scrutiny to the point system under the equal protection "component" of the Fifth Amendment's due process clause (or, alternatively, at the "intersection" of the free speech clause and the equal protection "component" of the Fifth Amendment).

AFA cites primarily our decision in *News America Publishing, Inc. v. FCC,* 844 F.2d 800, 814 (D.C. Cir. 1988), which applied heightened scrutiny to an act of Congress that singled out "with the precision of a laser beam," a corporation controlled by Rupert Murdoch. Murdoch's corporation had applied for, and received, temporary waivers from the FCC's cross-ownership rules, so that the corporation could acquire two TV licenses, one in Boston, and the other in New York. *Id.* at 804. Subsequently, Congress passed a law that prevented the FCC from extending any existing temporary waivers; at the time, Murdoch's corporation was the only current beneficiary of any such temporary waivers. *Id.* at 814-15. The law, however, did not prevent the FCC from granting new temporary waivers, or from extending those new waiver grants. Because Murdoch's corporation was the only current possessor of a waiver, therefore, the burden of this law fell only on his company. *Id.* This precision, we reasoned, warranted heightened scrutiny.

The point system's burden on AFA and similar religious networks falls far short of the laser-like precision present in *News America* that warranted heightened

scrutiny. As we explained above, the point system both burdens nonreligious networks and benefits, both currently and potentially, religious networks. And also for the reasons stated above, the point system is far from "astonishingly underinclusive," *News America,* 844 F.2d at 814, in advancing its legitimate purposes. Nothing in the point system singles out religious organizations, either expressly or in effect.

III. Conclusion

For the reasons expressed above, we deny the petitions for review.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Reexamination of the Comparative Standards for Noncommercial Educational Applicants	)	MM Docket No. 95-31

MEMORANDUM OPINION AND ORDER

Adopted: February 15, 2001 **Released:** February 28, 2001

By the Commission:
Commissioner Furchtgott-Roth issuing a statement

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I. INTRODUCTION

1. On April 4, 2000 we adopted a new simplified system to select among applicants competing to construct noncommercial educational ("NCE") broadcast stations, thereby eliminating the lengthy traditional hearings which we had used for 30 years. The new approach uses a point system to select among mutually exclusive proposals to build FM, TV, and FM translator stations on channels reserved for NCE use. The system for awarding points is based on such factors as diversity, localism, signal coverage, and service to schools, with a permit awarded to the applicant with the highest score. When NCE entities compete on channels also available for commercial use, we concluded that adoption of auction procedures was statutorily mandated. We now consider seventeen Petitions for Reconsideration or Clarification, ranging from requests for minor clarifications to advocacy of vastly different policy results. Upon considering these views, we basically affirm our initial decision but clarify various details, provide additional information, and amend several rule sections.

II. BACKGROUND AND HISTORY

2. Due to the finite nature of and strong demand for broadcast spectrum, we often cannot authorize an NCE station to every qualified entity that wants to build one in a particular area. Rather, we frequently must choose among multiple applicants. From the earliest days of broadcasting, the Commission conducted traditional

evidentiary hearings to make these selection decisions. The factors we considered in hearings depended upon which of two types of channels the applicants wanted to use. For "reserved" channels, which are for noncommercial educational use only, we considered "the extent to which each of the proposed operations will be integrated into the overall educational operations and objectives of the respective applicants." *See New York University*, 10 RR 2d 215, 217-18 (1967). For "non-reserved" channels, which are for all types of broadcasting, commercial and noncommercial, we used several comparative criteria. For example, we considered diversity of ownership and the "integration" of ownership and management, which presumed that a station would offer better service if its owners were involved in the station's day-to-day management. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). In comparative contests between NCE and commercial applicants on non-reserved channels, the applicants were evaluated using the commercial criteria.

3. As discussed in greater detail earlier in this proceeding, several events in the 1990's led to our eventual change of the comparative selection process both for NCE and commercial stations, and for both reserved and non-reserved channels. These events included the conclusion of the Commission's Review Board that the NCE criteria had, over time, become "meaningless" in distinguishing between applicants, and a federal court's finding that the core integration criterion used to evaluate non-reserved channel applications was "arbitrary and capricious, and therefore unlawful." *FCC v. Bechtel*, 10 F.3d 875, 878 (D.C. Cir. 1993) (*Bechtel*); *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577, 2580, n.8 (Rev. Bd. 1991). As a result of Commission proceedings soliciting

public comment, and Congress' decision on related matters in the Balanced Budget Act of 1997,[1] we implemented a system of competitive bidding for awarding permits on non-reserved channels[2] and adopted new point-based comparative standards for reserved channel noncommercial educational proceedings.[3] The NCE rules under review in this proceeding became effective on August 7, 2000.

III. NEW SELECTION PROCESS

4. Our *NCE Order*[4] established that the nature of the channel, not the nature of the applicant, should govern selection procedures. We decided that we were required by statute to use auctions to select among all mutually

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[1] *Balanced Budget Act of 1997*, Pub. L. No. 105-33, 11 Stat. 251 (1997) (Balanced Budget Act).

[2] *Notice of Proposed Rulemaking, Reexamination of the Policy Statement on Comparative Broadcast Hearings*, GC Docket No. 92-52, 7 FCC Rcd 2664 (1992); *Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5475 (1993); *Second Further Notice of Proposed Rulemaking*, GC Docket No. 92-52, 9 FCC Rcd 2821 (1994); *Notice of Proposed Rulemaking, Competitive Bidding for Commercial Broadcast and ITFS Service Licenses*, MM Docket No. 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, 12 FCC Rcd 22,363 (1997); *First Report and Order*, MM Docket No. 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, 13 FCC Rcd 15920 (1998), *recon. denied Memorandum Opinion and Order*, 14 FCC Rcd 8724, *modified Memorandum Opinion and Order*, 14 FCC Rcd 12,541 (1999), *aff'd sub nom. Orion Communications, Ltd. v. FCC*, 213 F.3d 761 (D.C. Cir.2000) ("*Competitive Bidding*").

[3] *Notice of Proposed Rulemaking, Comparative Standards for Noncommercial Educational Applicants*, MM Docket 95-31, 10 FCC Rcd 2877 (1995); *Further Notice of Proposed Rulemaking*, MM Docket No. 95-31, 13 FCC Rcd 21167 (1998) ("*NCE Notice*"); *Report and Order*, MM Docket No. 95-31, 15 FCC Rcd 7386 (2000).

[4] *Report and Order, Comparative Standards for Noncommercial Educational Applicants*, MM Docket No. 95-31, 15 FCC Rcd 7386 (2000) ("*NCE Order*").

exclusive applicants for non-reserved channels, because such channels can be used for commercial purposes. We designed a point system, described in greater detail below, to select among applicants on reserved channels. We determined that this bifurcated, channel-specific selection method is consistent with the Balanced Budget Act's dual directives to recover for the public the value of commercially available channels, but to use a different selection method for stations that cannot be used commercially. All requests for agency reconsideration or clarification focus on our point system decision for reserved noncommercial channels; none address our decision to apply auction procedures when NCE entities are among the applicants competing for non-reserved channels.[5] Accordingly, in this order we revisit reserved channel procedures only.

5. The *NCE Order* requires reserved channel applicants to apply during specific filing windows to be announced by public notice. The staff will examine all applications received within the window, to determine whether any two or more of those proposals are mutually exclusive, *i.e.* to determine whether the proposed stations

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[5] Currently, there are approximately 32 pending groups of non-reserved channel radio applicants, consisting of 192 applications, in which at least one applicant is an NCE entity. There are 5 such groups of non-reserved channel television applicants, consisting of 22 applications. Parties disagreeing with our decision to auction non-reserved channels, including National Public Radio and the State of Oregon, brought their challenge directly to the U.S. Court of Appeals for the D.C. Circuit rather than seeking agency reconsideration. *See National Public Radio, No. 00-1246* (filed June 12, 2000); *State of Oregon, No. 00-1255* (filed June 16, 2000). Although two petitioners, Spring Arbor College and Lay Catholic Broadcasting, originally sought agency reconsideration with respect to this issue, they subsequently withdrew those requests.

would cause prohibited interference to each other and thus cannot all be authorized. If a particular application is not mutually exclusive, and the applicant is subsequently found qualified, the staff will grant that application. For mutually exclusive applications received during the filing window, the staff will compare the proposals, considering which would best serve the public interest under our new point system.

6. When competing FM applications propose to serve different communities, a proposal would be considered best, as a threshold matter, if it would provide service to significant unserved or underserved populations.[6] This threshold factor is considered pursuant to 47 U.S.C. § 307(b), which charges the Commission with ensuring fair distribution of broadcast service. This process does not apply to television proceedings because fair distribution issues are addressed prior to application by the allotment of TV channels to particular communities in TV allotment proceedings.

7. Most mutually exclusive FM applications for reserved channels (*i.e.*, those not resolved on 307(b) grounds) and all such TV applications will be compared under a point system, in which we assign points to aspects of each proposal and select the applicant with the highest score. We would award points as follows: (a) 2 points for

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[6] Specifically, an applicant would receive a decisive preference if it would provide first or second NCE aural service to at least 10% of the people within the proposed 60dBu (1mV/m) service contours, but not fewer than 2,000 people. If more than one applicant meets this standard, the differences between their proposals would be considered significant only if one provided first or second service to at least 5,000 more people than the other.

diversity of ownership, *i.e.* if there is no overlap of the principal community contour of the proposed station and any other station attributable to the applicant; (b) 1 to 2 points for the best technical proposal in terms of both area and population served; (c) 3 points for applicants that have been local to the community for at least two years; and (d) 2 points for certain state-wide networks providing programming to accredited schools. In the event of a tie, we would apply several tie breakers, first preferring the applicant with the fewest existing authorizations; and second, the applicant with the fewest pending applications. If applicants remain tied after all of these factors are considered, we would require tied full service applicants to share time equally. Among tied FM translator applicants, we would select the first applicant to file. We would apply these procedures both to pending applications and to applications received in the future.

8. After completion of this process, we would conduct a study of the tentative selectee's application to determine whether it meets all of our standards for acceptability. At that time we would also consider petitions to deny against the tentative selectee only. If the tentative selectee is found qualified in all respects, we would award a permit to that applicant. Applicants prevailing in the point system would be subject to a four-year holding period, permitting the station's license to be assigned or transferred during that period only to an entity qualifying for equal or greater points, and for consideration that does not exceed the assignor's expenses of filing and prosecuting its application and constructing its station's authorized facilities.

IV. REQUESTS FOR RECONSIDERATION AND CLARIFICATION

9. Existing and potential applicants ask us to reconsider or clarify various aspects of our filing and selection processes. A few petitioners question our fundamental choices, for example, advocating the use of lotteries instead of a point system. Most, however, endorse our adoption of a point system, and ask only that we change or clarify a particular portion of our decision. Some have concerns relating only to pending applications or to future applications, while others raise issues potentially affecting all applications. We consider each of these concerns.

A. Objections to Overall Process

10. Two petitioners object to the point system in its entirety. Broadcasting for the Challenged, Inc., a licensee providing programming for disadvantaged individuals, believes that a lottery would have been far preferable. Broadcasting for the Challenged argues that we did not sufficiently justify our decision not to use lotteries. Educational Media Foundation, which operates a nationwide network of 23 FM stations programmed from a religious perspective, does not advocate a particular alternative but considers our point system discriminatory. It argues that the point system favors some speakers over others, to the detriment of religious broadcasters.

1. Rejection of Lotteries

11. The Commission has authority to use random selection (lottery) procedures to choose among NCE applicants. 47 U.S.C. § 309(i). If we use such procedures, the statute requires us to weight the lotteries to provide

substantial preferences to racial minorities and applicants with few other stations. *Id.* We considered using such lotteries, but found that a point system was preferable for several reasons. *NCE Order*, ¶¶ 11-15. We identified the primary benefits of lotteries as speed and simplicity. Against these benefits, we weighed three major disadvantages of lotteries: (1) greater potential for speculation; (2) no assurance of selecting the most qualified applicant; and (3) the likely delay from litigation over the required lottery preferences. We determined that lotteries would achieve only part of our goal to improve the NCE selection process, and thus rejected lotteries in favor of a point system.

12. Broadcasting for the Challenged ("BFTC") maintains that the Commission has not adequately justified rejection of lotteries, and should have supported each concern with empirical evidence, as it believes is required under *Bechtel*. BFTC disputes each of the three drawbacks that we included in our analysis. It disagrees with commenters concerned that lotteries would produce speculation, arguing that there is little potential for financial gain in NCE broadcasting, and that the Commission eliminated this potential by establishing a holding period. With respect to applicant qualifications, it argues that it is impossible to verify whether one qualified applicant will actually be better than another, and thus that we should consider all applicants as being equal if they meet our basic qualifications. Finally, BFTC does not believe that there is any legal impediment to our use of a weighted lottery, as required by statute, because we previously used such a lottery to select Low Power Television (LPTV) applicants.

13. We are not persuaded to reverse our policy judgment that a point system is preferable to a lottery for

the award of NCE permits. First, BFTC's reading of the requirements of *Bechtel* is overbroad. *Bechtel* holds simply that any predictive judgments used to select among broadcast applicants must have factual support. *Bechtel* does not, as BFTC argues, prevent the Commission from considering concerns presented in comments and applying its expertise to choose a selection method that it determines would best serve the public interest. Here, where both lotteries and point systems (a simplified form of comparative hearing) are presented to the Commission as options by statute, the Commission need not present empirical data to support the viability of either choice. Rather, we must select one of these options, offering a reasonable explanation that is supported by the record.[7] Then, the value of any predictive factors included within the option selected must be explained and supported, as we did in adopting point factors. Further, BFTC's suggestion that we erred in considering the potential for lotteries to spur speculation is based on its belief that NCE stations are immune to speculation either because such stations have limited monetary value or because they are subject to a holding period. Speculation, however, is not a concept limited to the quick "turn over" of stations for an inflated monetary value, something that our holding period addresses. NCE spectrum is a finite resource, with intrinsic value as an outlet for different educational viewpoints. Lotteries, due to their random nature, encourage mass filings of applications to increase the statistical "odds" that the applicant will obtain *any* station, *anywhere*. That too is speculation. Moreover, such practices are harmful to competing applicants because the random selection of an

[7] *See AT&T v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992).

applicant that could have met its goals anywhere will preclude the selection of an applicant that can fulfill its mission in only one location, such as where its campus or school system is located.

14. We cannot agree with BFTC's suggestion that an applicant's basic qualifications are all that matter in an educational broadcasting context. The Commission has in NCE broadcasting always sought to select the best applicant, not just any qualified applicant. BFTC provides no reason for us to depart from that policy. Finally, we explained that a decision to use weighted lotteries would likely prompt lengthy litigation, thereby causing significant delays in initiation of new NCE broadcast service.[8] It is reasonable for us to consider the potential for lengthy litigation in making policy choices.[9] Our previous use of weighted lotteries in the LPTV service provides no comfort or certainty because those lotteries were held prior to the Supreme Court's decision in *Adarand v. Pena,* 515 U.S. 200 (1995), when there was a lesser likelihood of a challenge to weighted lotteries.

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[8] *NCE Notice* at 7-8, n. 12 *citing Adarand v. Pena*, 515 U.S. 200 (1995) and *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, *petition for rehearing denied*, 154 F.3d 487, *petition for rehearing en banc denied*, 154 F.3d 494 (D.C. Cir. 1998). *See also Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349, 1358 (D.C. Cir. 1988)(agency using lotteries must use race-based weightings provided by statute).

[9] *Omnipoint Corp. v. FCC*, 78 F.3d 620, 633 (D.C. Cir. 1996) ("an agency may properly consider the avoidance of litigation-related delay when revising its rules").

2. Constitutional Concerns

15. Educational Media Foundation ("EMF") argues that our point system violates the First and Fifth Amendments to the U.S. Constitution, which limit government intrusion on free speech and on the free exercise of religion, and provide for equal protection under the law.[10] EMF acknowledges that the Commission expressed content neutral and speaker neutral reasons for adopting the point system. Nevertheless, EMF argues that the government's professed content and speaker neutrality does not necessarily make a rule constitutional, if the rule's effect is to discriminate against certain speakers or content. *Petition of EMF* at 21 *citing Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-643, 645 (1994). While recognizing that no party has an absolute right to receive an NCE license, but rather has, at most, a right to compete for a license, EMF argues that comparison must be fair and nondiscriminatory. EMF argues that our point system is unfair. It charges that the Commission engaged in results-oriented rulemaking with the explicit intention of discriminating against private speakers airing religious content and in favor of government speakers airing secular content. Thus, it argues that under "strict scrutiny," we must demonstrate that our point system is narrowly tailored to serve a compelling government interest.[11] EMF bases its arguments almost entirely on its conclusion that

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[10] We note that another broadcaster raised similar arguments in an appeal filed directly with the U.S. Court of Appeals for the D.C. Circuit. *See American Family Association, No. 00-1310* (filed July 14, 2000).

[11] *Petition of EMF* at 16-17 *citing FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Police Department of Chicago v. Mosely*, 408 U.S. 92 (1972); and *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

it and six other religiously oriented NCE broadcasters would not be selected in a point system if competing against government entities. It maintains that because religious broadcasters generally run national networks, do not provide programming to schools, and have many other existing stations and applications, such broadcasters could not likely qualify for points based on localism or state-wide networks, and would not fare well in tie breakers.[12]

16. The Center for Media Education ("Media Education") disputes EMF's constitutional arguments. It argues that there is no constitutional right to a broadcast license and that EMF's reading of *Turner* as requiring strict scrutiny is incorrect. Media Education cites to language in *Turner* which states "such heightened scrutiny is unwarranted when the differential treatment is 'justified by some special characteristics' of the medium being regulated." *Media Education Opposition* at 4 *citing Turner Broadcasting v. FCC,* 512 U.S. 622, 660-61 (1994). It further states that the Supreme Court traditionally considers broadcast cases under a more relaxed review, due to the special attributes of broadcasting. *Id.* at 5 *citing Reno v. ACLU,* 521 U.S. 844, 868 (1997). In any event, it maintains that because our point system does not require or prohibit the carriage of a particular point of view, it is content neutral, and would be subject to lesser scrutiny. *Id. citing Time Warner Entertainment v. U.S.,* 211 F.3d 1313 (D.C. Cir. 2000). Media Education believes that the implication that the Commission has an "anti-religion agenda" is baseless, as evidenced by the Commission's

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[12] *See Petition of EMF* at 19-20.

grant of large numbers of licenses to religious broadcasters.[13]

17. We do not believe that there is any constitutional infirmity in our point system. Each factor within the point system is speaker and subject matter neutral. If, as EMF claims, it will be disadvantaged by the rules, it is not because the rules favor secular applicants over religiously affiliated applicants. Rather it is because EMF is a national organization that is already the licensee of many NCE stations, while the Commission sought in the rules to encourage localism and diversity of ownership. A secular national organization licensed to operate many NCE stations would have the same disadvantage under the point system. EMF's religious focus has no bearing on the operation of the rules. In the *NCE Order* we explained:

> We have considered, but disagree with, the minority viewpoint that a credit for localism would adversely impact religious organizations or small organizations. A localism credit is religion-neutral and size-neutral. Whether religious or secular, large or small, an organization based in the local community would qualify for the credit. Moreover, organizations both with and without religious affiliation, and of varying sizes support a credit for localism.

NCE Order ¶52.

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[13] Media Education, citing an independent report, states that there are 1,731 radio and 285 television stations licensed to religious broadcasters, of which over 700 radio and 23 television stations are on reserved NCE channels. *Opposition of Center for Media Education* at 6, n. 3 *citing* Jerold M. Starr, *Signal Degradation*, AMERICAN PROSPECT, Aug. 14, 2000, at 22.

18. Because the point system does not reflect a government preference for the content or viewpoint of a particular speaker, strict scrutiny does not apply. *See Turner Broadcasting v. FCC*, 512 U.S. 622, 656-59 (1994); *Time Warner Entertainment v. U.S.*, 211 F.3d 1313 (D.C. Cir. 2000) (*Time Warner*). A content neutral regulation passes intermediate scrutiny if it advances important governmental interests, unrelated to the suppression of free speech, and does not burden substantially more speech than necessary to further those interests. *Time Warner,* 211 F.3d at 1318. A more deferential standard of review has been applied to broadcast regulation. *See, e.g.*, *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978). Our point system advances important government interests in local broadcasting and education.[14] Further, the point system is not a new burden on any particular speaker, but rather a system that incorporates several longstanding policy goals into one cohesive method for selecting among mutually exclusive applicants. For example, the importance of localism in noncommercial educational broadcasting is longstanding and reflected in the statute. *NCE Order* ¶¶44-51. Similarly, the Commission's decision to award a permit in the event of a tie to the applicant with the fewest existing authorizations, is consistent with our longstanding focus on diversity of ownership of broadcasting stations. Our decision to award points to applicants that are part of state-wide networks is consistent with our

[14] *See Turner*, 512 U.S. at 663 (the importance of local broadcasting can scarcely be exaggerated); *Cable Television Consumer Protection and Competition Act of 1992*, Pub.L. 102-385, 106 Stat. 1460, § 2(a)(8)(A) ("[P]ublic television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens").

longstanding policy of considering an NCE applicant's participation in state-wide education plans.[15]

19. As EMF acknowledges, there is no constitutional right to a broadcast license. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-89 (1969). Given the nature of spectrum licensing, our grant of one mutually exclusive broadcast application under any selection method will inevitably mean our denial of another application. Whether our selection decision is made pursuant to a point system or some other method, it is well established that denial of an application for a broadcasting license "if valid under the [Communications] Act, is not a denial of free speech." *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943).

20. EMF claims that the Commission had some unstated goal to disadvantage religious broadcasters. That is simply not so. Indeed, the record indicates that the Commission was responsive to the concerns of NCE organizations with religious affiliations as well as those without such affiliations. For example, we expanded the definition of state-wide network, which was originally expressed in terms of participation in government educational plans, to also include private networks offering significant service to schools. *NCE Order* at ¶ 59. We indicated that religious organizations that operate schools,

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[15] Consideration of state-wide plans prior to adoption of the point system was codified in Section 73.502 of our rules, stating that "the Commission will take into consideration the extent to which each application meets the requirements of any state-wide education plan for noncommercial educational FM stations . . . " That rule has been superseded by the more specific state-wide network credit. *See NCE Order* at para. 61.

such as the Catholic Archdiocese or religious universities, might qualify for state-wide network points. *Id.* at ¶¶ 57-59. Given that our decision concerned award of permits to provide noncommercial *educational* broadcast service, we believe that it was eminently reasonable to encourage, though not require, service to schools.

21. Accordingly, we reject the constitutional challenges to our use of a point system. Having found that our choice of a point system over other options is sound overall, we now will examine various aspects of our decision to determine whether modifications or clarifications of that system would be useful.

B. Time for Calculating Points/Enhancement of Proposals

22. Generally, the *NCE Order* provided that we would award points for the relative merits of an applicant's proposal as of the time of filing, provided that the applicant maintains the qualities for which points are awarded.[16] Several petitioners, including Colorado Christian University and Jimmy Swaggart Ministries anticipate timing concerns not specifically addressed in our decision or rules and request clarification. Of particular concern is how the Commission will view changes that occur after the time of application, such as an applicant's attempt to enhance its proposal or changes in census data that occur naturally over time. This issue is relevant to all NCE

[16] *See* 47 C.F.R. § 73.7003 (localism points and tie breaker factors considered as of date of filing); *NCE Order*, Appendix A (technical parameters considered as of close of filing window); *NCE Order* at ¶ 40 (technical factors must be maintained).

proceedings, but is especially of concern to organizations with pending applications.[17] In order to address apparent uncertainties regarding both current and future applicants, we here clarify with more specificity the process for counting points in future proceedings and the similar, but somewhat modified, process that will govern pending applications.

1. Timing for Future Applications

23. In the *NCE* Order we established the "time of filing" as the time for determining points. We did not provide an in-depth discussion of that choice, however, and we now elaborate in order to clarify our decision. We selected the time of filing so that there would be no need for the staff and applicants to constantly recalculate points and to minimize one-upsmanship. Applicants may not continuously amend their proposals and qualifications in attempts to surpass other mutually exclusive applicants, but rather must present initially, their proposal to provide the best possible service to the public regardless of whether or what any competing applicants may file. An applicant's characteristics at the time of filing establish a "snap shot" that we will generally use to determine the applicant's maximum points and its maximum position in a tie breaker. However, points can be lost through changes that detract from the original proposal.

24. Our rules require applicants to inform us of material changes in their applications after the time of filing, which, in the context of a point system, will include

[17] Currently pending are 1,369 reserved channel radio applications and 67 reserved channel television applications.

all changes that negatively affect its claimed points and tie breaker position. 47 C.F.R. § 1.65. A future applicant's maximum points and its standing in a tie breaker can thus go down, but not up as a result of changes made after filing. For example, if an applicant loses its transmitter site and amends its application in a way that results in lost points, the applicant will only be allowed to claim the amended points. In this way, the applicant will not benefit from any early proposals that it is unable to honor. However, if the applicant amends and attempts to enhance points, the applicant will only be allowed to claim its earlier lesser points. In this manner, applicants with superior initial proposals will not be disadvantaged by any competing applicant's later attempts at enhancement. This will also encourage applicants to come forward with the best possible proposal and minimize the potential for any manipulation of the system. In addition, we believe that a proposal crafted without knowledge of competing proposals is a more reliable indicator of future service than one crafted with an eye to outdoing a competing applicant.

25. Similarly, for tie breakers, the applicant's best position is established at the time of application, but can be reduced. For example, in our primary tie breaker, which selects the applicant with the fewest number of broadcast authorizations at the time of filing, an applicant cannot enhance its position by selling one of its existing stations, but can diminish its position by acquiring an additional station. Thus, an applicant with no existing stations at the time of application will benefit from its "zero" stations in tie breakers only until such time as it receives a first authorization. It will be required, pursuant to 47 C.F.R. § 1.65, to update its pending applications and so will not be able to continue claiming zero authorizations, when it

has, in fact, already had applications granted in several proceedings, perhaps now surpassing a tied competing applicant in terms of stations authorized.[18]

26. When future applicants report population and other stations serving an area, as they might for fair distribution purposes under 47 U.S.C. § 307(b),[19] they should use the data that is the most current at the close of any filing window. It is inevitable that there will be shifts in population and in number of services authorized in a region between close of a window and the time we act on an application. However, such inevitable changes will not reduce a future applicant's standing, and thus we will not require such applicants to notify us if these expected changes occur after the close of the window. Of overall concern to us in this area is that we are comparing applications that use the same data. Reliance on information as of the close of the window will ensure that applicants have essentially a common reference date. With a common reference date and a common method of calculating population[20], the staff will analyze applicants on a similar basis.

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[18] Under 47 C.F.R. § 1.65 an applicant has an obligation to report any material changes in its pending application. For example, with respect to authorization count, which can change frequently, applicants must update their applications upon occurrence of a change that could reduce their position. We stress that the applicant has an affirmative Section 1.65 obligation to report any change potentially affecting their eligibility for points or position in a tie breaker, even with respect to matters on which the Commission itself has acted.

[19] *See* ¶ 6 *supra*.

[20] Population will be calculated using a block level centroid retrieval method, in which the applicant uses "centroid" points representing population at designated coordinates as identified by the U.S.

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2. Timing and Enhancement for Pending Mutually Exclusive Applications

27. Applicants with pending applications filed prior to adoption of the point system must supplement their application to provide us with additional information needed to consider their applications under the new comparative standards. As we will be unable to consider any pending application that does not contain the new information, we will assume that any applicant that fails to file a supplement is no longer interested and dismiss its application.[21] We now clarify the procedures for filing these supplements, which will depend upon whether the applicant is in a group that is considered "closed" or "open" in terms of whether it is subject to future competition from additional parties.

a. Closed Groups

28. Due to a processing freeze that has been in place while we establish and review the NCE comparative criteria,[22] there are some groups of mutually exclusive applications which have been pending for a considerable time, and which are no longer subject to

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Census Bureau, to determine the population within the applicant's proposed service area. *See NCE Order* at ¶¶ 26 and 40.

[21] However, the failure to file a point supplement because the applicant has instead filed a settlement consistent with paragraphs 96 to 99 *infra* will not result in dismissal. Only in the event that the settlement is denied, and the applicant thereafter fails to file a supplement by a new date would such failure to file a settlement result in dismissal.

[22] *See* Public Notice, *FCC Freezes Comparative Hearings*, 9 FCC Rcd 1055, *modified*, 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 2877, 2879; 10 FCC Rcd 12182 (1995).

additional competing applications. These groups are referred to as "closed" groups. As stated in the *NCE Order*, existing applicants in these "closed" groups will need to file supplements to claim points so that we can compare them under the new system. We delegated to the Mass Media Bureau responsibility to announce the procedures for filing these supplements. We did not specify whether longstanding applicants might enhance their proposals and claim points for changes made in response to the *NCE Order*. Colorado Christian University asks us to "freeze" an existing applicant's points at a particular point in time, to avoid the potential for pending applicants to become "moving targets." Jimmy Swaggart Ministries suggests that we examine an existing applicant's points as of the date of application to avoid uncertainties associated with applications that have been pending for a considerable time. For example, it argues that, for purposes of our fair distribution analysis, which considers whether applicants will provide a first or second NCE radio signal to an underserved area, pending applicants that proposed first or second service at the time of application should benefit, even if the Commission since has authorized additional stations.

29. Educational Media Foundation notes that, for some pending closed mutually exclusive groups, we have not issued B cutoff notices.[23] EMF further notes that under

[23] Under the former A/B cutoff procedures, the staff issued an "A" list announcing the filing of an initial "A" application. That list established an "A" cut-off date, 30 days later, by which any applications competing against the "A" application were due. If the staff, after study, determined that competing applications were received, it would issue a "B" list, identifying all mutually exclusive applications and inviting petitions to deny. However, given that the current proceeding proposed

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the A/B cutoff procedures that existed prior to adoption of the point system, applicants could amend as a matter of right until issuance of a "B" cutoff notice, and the Commission considered these amended proposals, rather than the original proposals, in comparative hearings. *See* 47 C.F.R. § 73.3522(b). Based on this line of reasoning, EMF believes that we should permit all types of enhancing amendments to existing applications, including technical amendments. The National Federation of Community Broadcasters argues that, with respect to changes in technical proposals, applicants should only be able to enhance their points by making changes considered "minor" under our rules.

30. We have attached as Appendix D a list of closed mutually exclusive groups, *i.e.* groups in which we issued an "A" cut-off list under the old rules and for which the time for filing responsive, competing applications has closed. Most of the point principles enunciated above for future applications will govern our treatment of applications in these pending "closed" groups. However, we will make several adjustments to account for the fact that these older applications did not contain point information as filed, and that applicants must now file supplements to claim points. To the extent possible, we will use a recent date for purposes of taking a "snap shot" of applicant qualifications. As a result, we will be able to consider recent information rather than information that may be

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to change the criteria used to evaluate competing applications, issuance of "B" lists inviting petitions under the old criteria would have been an inefficient use of resources both for the staff and potential petitioners. Therefore, among the applications on file, are closed groups of applications for which no "B" list was issued.

several years old. A recent "snap shot" date will also give pre-point system applicants an opportunity to incorporate into their proposals point factors that we adopted and clarified after their original filing date, and which we have since indicated are desirable and in the public interest. Specifically, the date that pending applicants must use for reporting population/service data for 307(b) determinations and for most point data is the "supplement date," a date after release of the current decision that the staff will announce by public notice, and by which pending applicants must file supplements to claim points. By the supplement date, applicants in closed groups must file either settlement agreements, as discussed *infra* at paras 96-99, or supplements. Those filing neither will be dismissed. We will use the supplement date to examine all data, except for the applicant's technical proposal, for which we will use the earlier date discussed further below. So as not to unduly delay this proceeding, the staff should set a due date for supplements that is approximately 30 days after the public notice. The staff will evaluate any non-technical changes to an applicant's proposal pursuant to the criteria established in the point system. For example, if an applicant unconditionally withdraws previously filed applications or consummates approved assignments of authorized stations to other entities prior to the supplement date, those stations would not count against the applicant for purposes of a tie breaker, regardless of how many applications or authorizations they may have held at the time of original application.[24] An applicant that changed its board

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[24] Applicants may not enhance their position based on matters that require additional Commission or applicant action. For example, they must consider as pending any applications for which their requests for withdrawal are conditioned on our approval of a settlement agreement.

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composition or established a local campus in response to our point system, however, would not be able to claim points as an established local applicant because our point system recognizes such local indicia only if they have been maintained for at least two years.

31. With respect to the applicant's technical proposal, we will calculate points based on an earlier date. We are compelled to reach this result because the staff has already fully studied all applications in closed groups based on earlier claimed coverage to determine which applications are mutually exclusive. Technical changes now would cause undue delay, requiring reexamination of new technical proposals for potential conflict with over a thousand applications on file, not just with respect to other applications within each closed group.[25] For closed groups in which both "A" and "B" cut-off notices have issued, we will calculate technical points as of the date of

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Similarly, they must include as existing authorizations any station for which an assignment of license has not yet been consummated, even if an application to assign has been filed or approved.

[25] To ensure efficient processing of NCE FM applications, we waive the city grade coverage requirement recently adopted in MM Docket No. 98-93 for all mutually exclusive radio applications subject to the comparative procedures adopted herein. Absent a waiver, these radio applicants would have been required to amend their applications by February 19, 2001 to provide a predicted 60 dBu strength signal to at least 50% of their communities of license or to 50% of the population of the community. *See Streamlining of Radio Technical Rules,* MM Docket No. 98-93, FCC 00-368, ___ FCC Rcd ___ (released November 1, 2000), 65 Fed. Reg. 79773 (December 20, 2000). Moreover, we will not accept amendments to those applications filed under the "good cause" standard where such amendments are intended to establish compliance with the new community coverage requirement. We note that petitions for reconsideration of this issue were filed in MM Docket No. 98-93, and we will act on those petitions in a subsequent order in that proceeding.

the "B" notice, which announced applications in the mutually exclusive group and cut off the opportunity to file amendments as of right under the rules then in effect. Thus, these applicants will have the same amendment as of right period that they would have received under our previous rules. For closed groups in which no "B" cut off notice has issued, we will examine technical proposals as of April 21, 2000, the release date of the *NCE Order*. We ceased issuing "A" and "B" lists as of that date. Applicants in this category will thus also have had some time to make technical amendments as of right, albeit less than they might have received had the Commission not eliminated its use of cut-off lists. After the relevant date, applicants may not amend their proposals except for good cause pursuant to 47 C.F.R § 73.3522(b), such as an applicant's involuntary loss of its transmitter site. With respect to good cause amendments, applicants will not receive additional points, and may lose points for any such amendments that decrease the applicant's proposal. A technical amendment that removes a mutual exclusivity, thereby permitting our grant of an application, would be considered a good cause amendment.

32. We do not agree with Jimmy Swaggart Ministries that we should use data that dates back many years in analyzing fair distribution issues for applicants in closed groups. Traditionally, in examining fair distribution pursuant to Section 307(b) of the Communications Act, proposals are analyzed as of the date that 307(b) information is requested. For many NCE applicants, we have not yet requested any 307(b) information. It would not be appropriate or practical to ask such applicants to now submit such information as of a date long passed, because this would require applicants to undertake a *more* difficult

process in order to provide the Commission with *less* accurate information. For some other NCE applicants, we may have requested 307(b) information in hearings that were conducted under old standards and that were not dispositive. In the *NCE Order* we established new standards for conducting Section 307(b) analyses, and any information submitted under the old standards would be inadequate or incomplete under the new standards. Thus, even applicants that previously submitted 307(b) information will need to submit different 307(b) information as of the "supplement date." Accordingly, the supplement date will serve as the "snap shot" date for 307(b) information. Applicants supplementing their applications with population data should use the 2000 census, if available by the supplement date.

b. Pending Applications Subject to Future Competition

33. West Coast Public Radio ("West Coast") seeks special consideration for a specific type of pending application, *i.e.,* those that are still subject to competing applications because they were neither filed in response to an "A" notice nor themselves placed on an "A" notice. We stated in the *NCE Order* that, because the opportunity to file competing applications has not yet run, we will consider these pending applications in the first filing window, along with any additional applications filed during that window. This result creates a timing issue with respect to when to calculate the points of the pending applications and the future applications with which they will be competing.

34. West Coast is particularly concerned that future applicants filing in the first window may attempt to tailor

mutually exclusive proposals to claim more points than existing applicants who must also compete within that window. West Coast bases this belief on the assumption that existing applicants will claim points as of their original date of application, whereas the future applicants with whom they will compete will be able to claim points as of a date within the window. It suggests that we award additional points to the existing applicants so that they will be able to compete effectively with future applicants. We decline to do so. We clarify, however, that such existing applicants may be able to claim more points than those for which they qualified at the time of their original application. They have two options available to them. First, they may choose to amend their pending applications during the first filing window to enhance their proposals and provide comparative information. Alternatively, they may withdraw their pending applications prior to the first filing window and file new proposals in the first filing window. In either case, existing applicants that are subject to competition will have the same opportunity as new applicants to submit their best proposals during the first filing window.

C. Fair Distribution of Service as a Threshold Issue (Radio Only)

35. Several parties ask for clarification of our fair distribution process. We decided in the *NCE Order* that, if mutually exclusive NCE radio applicants specify different communities, we would first consider, pursuant to Section 307(b) of the Communications Act, whether grant of one proposal over the other is warranted based on fair distribution of service principles. An applicant would receive a decisive preference, as a threshold matter, if it would

provide a first or second NCE aural service to 10% of the people within the proposed station's 60dBu contour, but to no fewer than 2,000 people. If more than one applicant meets this standard, we would award a preference only if one proposal provides first or second service to 5,000 more people than the other. This standard is similar in some respects to the 307(b) standard previously applied in traditional NCE hearings, but borrows some factors used in the 307(b) analysis of commercial applications.[26] To maintain the benefits of fair distribution, we stated that applicants selected based on NCE fair distribution standards would not be permitted to downgrade service to the area on which the credit was based. Because applicants chosen through fair distribution would not be subject to a point system, however, they would not be subject to four year holding period provisions, which require applicants to maintain factors for which they received points and limit the terms on which the applicant may transfer the station to another party.

36. Jimmy Swaggart Ministries argues that the fair distribution analysis should be expanded to all mutually exclusive applications, not just those proposing to serve different communities. In contrast, Station Resource Group ("SRG"), an association representing NCE licensees,

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[26] To the extent that the 307(b) standards we will use for NCE stations are more stringent than those applied to commercial stations, we noted that areas underserved in terms of NCE service are not likely to be true "white" or "gray" areas, because areas with few NCE signals will likely receive additional service from commercial stations *NCE Order* at n. 16. We also noted that the outcome of a successful 307(b) analysis in commercial TV and FM proceedings is the allocation of a channel to a community but not to any particular licensee, whereas in an NCE analysis the outcome is award of a license.

argues that 307(b) considerations should be given lesser importance, examined as part of a point system, and not as a threshold issue. SRG argues that Section 307(b) of the Communications Act does not compel us to consider fair distribution as a threshold issue, and maintains that in traditional comparative hearings this factor was given less weight.

37. The scope of our fair distribution analysis was an issue fully considered in the *NCE Order*. By the express terms of 47 C.F.R. § 73.7002(a), adopted therein, the 307(b) analysis is conducted only if applicants propose to serve different communities. Differences in coverage among proposals to serve the same community are adequately considered within the point system, which includes a consideration of technical parameters. Differences in area and population served within the same community are considered by awarding points for technical parameters. *See also* paras 75-76 *infra*. Our decision is entirely consistent with our responsibility under Section 307(b), as long interpreted by the courts and the Commission. The statute is explicit that the Commission must distribute broadcast licenses "among the several States and the communities so as to provide a fair, efficient, and equitable distribution of radio service to each of the same," but does not mandate a particular procedure that the Commission must follow. *See Competitive Bidding*, 13 FCC Rcd 15920, 15963 (1998). While Swaggart urges us to expand the 307(b) threshold to encompass all applications with different reception areas as well as different communities of license, nothing in the language of the statute, with its explicit reference to "communities" supports such an extension. Nor does Swaggart cite any Commission-level precedent in which any applicant received a preference for

such matters. The Commission's use of a threshold 307(b) determination in NCE cases was thus fully consistent with the statute, as interpreted by the Commission and the courts. *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955); *Pasadena Broadcasting Co. v. FCC,* 555 F.2d 1046 (D.C. Cir. 1977); *Competitive Bidding*, 13 FCC Rcd 15920, 15963 (1998).

38. With respect to the question of whether to consider fair distribution individually or to integrate it into a point system, we concluded that we should give this factor decisive weight prior to any point system. *NCE Order* at ¶ 24. There is no merit to SRG's suggestion that our approach is inconsistent with agency precedent. It relies on *New York University*, 10 RR 2d 215 (1967), the first NCE comparative case. SRG alleges that the modified hearing designation order in that case afforded the Administrative Law Judge discretion to give whatever weight he deemed appropriate to the 307(b) issue and that the judge did not give that issue dispositive "threshold" weight. However, the Review Board's subsequent opinion in that case makes clear that 307(b) issues can be dispositive, as long as the differences are not slight, as they were in that proceeding. *New York University*, 19 FCC 2d 358, 370-71 (Rev. Bd. 1969). By means of the formula prescribed in 47 C.F.R. § 73.7002(b), we have ensured that only significant 307(b) differences are decisional, just as the Review Board envisioned in *New York University*. When two applicants have only small differences under 307(b), we proceed to consider them pursuant to a point system. Differences among applicants for the same community are considered under the point system's technical factor, if significant in terms of both area and population.

39. We do, however, note that our discussion of 307(b) in the *NCE Order* did not contemplate the possibility that two applicants offering similar levels of new NCE service pursuant to 307(b), and therefore proceeding to consideration under a point system, could be part of a larger mutually exclusive group with applicants proposing to provide service not deserving a 307(b) preference or deserving a lesser 307(b) preference. We clarify that under such circumstances, only the applicants that are entitled to equal Section 307(b) preferences will proceed to consideration under a point system.[27] The other applications, which are entitled either to lesser or no preferences under Section 307(b), will not be considered along with those applicants in a point system, consistent with our determination that fair distribution of service should be given decisive weight.

40. Colorado Christian University asks whether the new fair distribution standard developed for NCE stations will be based only on first or second service *received* or also, as in commercial allocations proceedings, on first transmission service *licensed to* a community. It is concerned about potential abuses that may occur if first licensed transmission service is applied in an NCE context. Station Resource Group also shares this concern. It believes that an applicant proposing to provide a first or

[27] For example, in a group of three applicants serving different communities, if two of the applicants would provide first NCE service to similarly sized populations, while the other applicant proposes only a second or third NCE service, we would conduct a point "hearing" only among the applicants proposing first service. We would dismiss the third applicant because either one of the remaining applicants would have prevailed over that applicant in a 307(b) determination.

second NCE reception service is providing a more important service than an applicant merely licensed to a community. In particular, SRG observes that under the rules applicable at the time of its comments, reserved channel NCE-FM stations had no obligation to place a city grade contour over their nominal communities of license, and could designate any community within the 60dBu contour as the community of license.

41. The fair distribution standard that we adopted was based only on provision of the first or second NCE reception service for a significant population. Applicants would receive no preference by proposing the first station to be licensed to a city or town, when that community already receives two or more NCE signals. First aural service licensed to a community is considered in commercial broadcasting, which has longstanding community coverage requirements, but has not played any significant role in NCE broadcasting which until recently had no community coverage requirements and now has requirements that are significantly less stringent than those applicable to commercial broadcasters.[28] We do not believe that consideration of first service licensed to a community would serve the same purpose in NCE broadcasting as it does in commercial broadcasting. Further, as commenters stated earlier in this proceeding, our crediting only service received reduces the potential for abuse. Otherwise, NCE

[28] NCE FM stations must provide a predicted 60 dBu signal to at least 50 percent of the area or population of the community of license, whereas commercial stations must provide a 70 dBu signal to the entire community of license. *See Streamlining of Radio Technical Rules,* MM Docket No. 98-93, FCC 00-368, ___ FCC Rcd ___ (released November 1, 2000). *See also* note 25 *supra.*

applicants might identify small communities that they would not fully serve, receiving a decisive preference over applicants with nearly identical service areas but that propose to be licensed to larger communities. *NCE Order* at ¶ 22. Accordingly, our NCE fair distribution analysis is based on new service received, not on first transmission service licensed to a particular community.

42. Next we consider the views of Munn-Reese Engineering Consultants and the University of Northern Ohio, which ask us to clarify whether, for purposes of our 307(b) analysis, stations operating noncommercially in the non-reserved portion of the FM band or in the AM band will count as NCE aural signals received. If so, they ask what factors we would use to determine whether such a station provides NCE service. Munn-Reese notes, for example, that although stations can operate noncommercially in the non-reserved portion of the band, some are licensed as commercial stations subject to filing fees, while others are licensed as noncommercial stations and are exempt from filing fees.

43. In determining whether a significant population receives NCE aural service, *i.e.*, whether it is unserved or underserved by existing NCE stations, we will count as first and second signals only *reserved channel* NCE-FM stations. Historically, the Commission has only considered stations operating on reserved channels to determine the level of NCE service already received, and we see no reason to change that practice in this context. *See New York University*, 10 RR 2d 215 (1967). As we noted in the *NCE Order*, stations operating on non-reserved channels voluntarily choose to provide NCE service, but can readily become commercial stations by filing a simple form with

us. In contrast, noncommercial service on reserved channels is mandatory and permanent. Due to this potential for rapid change in the nature of non-reserved channel stations, we do not believe that the NCE service provided by these stations is sufficiently fixed to be counted in our analysis. Thus, in an NCE fair distribution analysis, we would grant an application proposing to provide the first reserved channel FM service a preference, without regard to whether nearby AM and non-reserved channel FM stations currently operate with noncommercial educational formats.

44. Colorado Christian University raises additional fair distribution concerns, asking us to apply all aspects of our four-year holding period to applicants receiving their permits as a result of a fair distribution preference. Colorado Christian acknowledges that we already prevent technical downgrades to the area on which we granted a fair distribution preference, but believes that other holding period restrictions should apply as well. It argues that there is the need to prevent speculation by all successful applicants, not only those awarded by a point system. It further maintains that because an applicant receiving a 307(b) preference has a decisive advantage over other applicants, it is especially important to hold such applicants to every part of their proposals. We disagree with this reasoning. To uphold the integrity of the point system and prevent speculation, we require each point system selectee to operate the station for four years either itself or by assigning the station to another party with equivalent point credentials for consideration not to exceed reasonable expenses. If an applicant is selected on the basis of fair distribution criteria, its point claims are not relevant and are never examined. Thus, a requirement that any

successor in interest have "equal points" would not be especially meaningful and not necessary to preserve the integrity of our process. We believe that it would be overly restrictive to require applicants to maintain attributes for which they claimed points if those attributes are not decisional. What matters in the fair distribution context is that any successor in interest continues to provide service to the area for which the original applicant received its fair distribution preference, as our current rules already require. The particular weight given to 307(b) considerations does not in itself justify placing additional non-307(b) obligations on the applicant.

D. Point System Factors

1. Established Local Applicants

45. Our point system awards the largest percentage of points to established local applicants. Initially, we expressed concern that awarding credits in a point system for an applicant's local characteristics might be difficult to support under the standards enunciated in the *Bechtel* case. As discussed previously, that case invalidated the use of the "integration" credit, which awarded a significant comparative advantage to commercial broadcast applicants proposing to work at their proposed stations as owner-managers. The court found that there was no empirical evidence supporting the use of this criterion. We reexamined our concern, however, in response to strong commenter support for localism points, including some that provided statistical and historical evidence of the important role that localism plays in educational broadcasting. Ultimately, we found the comments sufficiently convincing that we chose localism as the single most important factor in our NCE point system. Under the

point system, an applicant that has been local for at least the two years immediately preceding application, *i.e.*, that has continuously maintained its headquarters, campus, or the primary residences of 75% of its board members within 25 miles of the central coordinates of its community of license, receives three points out of a possible seven. We stated that governments would be considered local within their areas of jurisdiction.

46. Broadcasting for the Challenged (BFTC) argues that the Commission's decision is contrary to *Bechtel*. According to BFTC, our decision was not supported by empirical evidence that an applicant that is local before filing an application is superior to an applicant that becomes local after its application is granted. In response to the Commission's reliance on the 1967 Carnegie Report as historical evidence, BFTC argues that the Report's use of the term "local stations" did not mean only those built by local groups.[29] It maintains that a national group can build a local station and become very involved in the community. Similarly, Educational Media Foundation maintains that that there is no nexus between where a station's board members live or where its headquarters is located and the type of programming it will carry. It notes, for example, that the Commission has not set any required amount of time that a local licensee must devote to locally produced programming or local issues. EMF argues that the Commission should not favor local broadcasters based on a belief that national NCE broadcasters can apply

[29] In describing to Congress the vision for educational television, the Carnegie Report identified "local stations," as having the "heart of the system . . . in the community," and maintaining "a firm grasp on the nature and needs of the people it serves." *NCE Order* at ¶ 44.

elsewhere, because national NCE broadcasters will likely be competing against a local broadcaster in every market.

47. We affirm our decision in the *NCE Order* regarding localism for the reasons discussed therein. In brief, a localism credit is fully consistent with the *Bechtel* court's concerns. Commenters provided convincing empirical evidence of public benefits resulting from localism in NCE broadcasting.[30] They also demonstrated that localism is a factor that has historically been considered the lynchpin of excellent NCE service because local NCE licensees are knowledgeable of the community's educational needs, responsive, and accountable to the community.[31] In response to EMF's concern, we clarify that being knowledgeable and responsive does not necessarily require that a local NCE licensee must air programs produced by local citizens, especially if, in the informed judgment of the licensee, other programs are better suited to meeting the station's educational goals. Local organizations are, however, more likely to be aware of locally produced programs that are available and thus to consider such programs. We do not imply that a non-local organization

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[30] *See NCE Order* at ¶ 47 *citing Joint Comments of National Public Radio, Association of America's Public Television Stations* and the *Corporation for Public Broadcasting*.

[31] In this sense, we clarify that NCE licensees and the stations they operate, may be viewed as similar in many ways to school boards and the schools they operate. Our nation's schools are primarily locally controlled, with each public school board or private board of trustees having sufficient knowledge about its respective communities to run schools in a way that responds to that community's educational needs. Indeed, such boards have vested interests in being responsive because they will be held accountable to their communities for schools that do not live up to their community's standards.

that receives a broadcast authorization and begins operating within a community may not, with time, acquire the knowledge of the community to be responsive to its educational needs and to become such a part of the community as to have local accountability. But an organization that has already been local for two years or more, as required for the credit, has those qualities prior to its very first broadcast and can thus "hit the ground running." We also continue to believe that it is efficient to meet the spectrum needs of NCE applicants in the local areas surrounding their headquarters and campuses because distant locations may be unsuitable for their needs. In observing that some non-local applicants with broad goals will be able to apply elsewhere if they do not prevail in a particular community, we indicate merely the additional opportunities available to such applicants. We do not, as EMF indicates, assume that it will always be easy for such applicants to prevail elsewhere. Finally, we stand by our decision to award 3 out of a possible 7 points to established local applicants. This weighting reflects the importance of localism in NCE broadcasting. Further, as we noted in the *NCE Order*, this proportion is similar to one used in the Instructional Television Fixed Service, another educational communications service in which localism is strongly encouraged.

48. Having affirmed our three-point credit for established local applicants, we next consider the proposal of several petitioners that we broaden the class of applicants that would be considered local. West Coast Public Radio and Station Resource Group both ask us to expand the measure by which an applicant's headquarters, campus, and board members are considered local, replacing

our 25-mile standard with a 100-mile benchmark. According to West Coast, the 25-mile standard is used as a basis for main studio location[32] but only because of concerns about studio accessibility, and does not necessarily reflect what the community considers local. It states that TV and Class C FM stations may cover as much as 50 miles. The National Federation of Community Broadcasters ("NFCB") similarly proposes a standard of localism based on each station's coverage area, noting that rural stations may serve larger areas than urban stations.

49. West Coast and SRG both also ask us to incorporate into 47 C.F.R. § 73.7000 the concept that government applicants are local within their jurisdiction. Real Life Educational Foundation proposes that an organization should be considered local if a majority (instead of 75%) of its board consists of local residents, because control rests with a majority of the board. It further asks us to clarify whether a new organization would qualify for points if board members who have been local for two years form it. Real Life maintains that we should give credit to long time residents regardless of the length of time that their organization has been in existence, arguing that to do otherwise is arbitrarily giving credit only for "brick and mortar." Real Life also asks us to clarify how we will apply our localism criteria to organizations that have had applications pending for substantial periods.

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[32] *See* 47 C.F.R. § 73.1125(a)(3) (establishing 25 miles from the reference coordinates of the center of the community of license as one of three acceptable locations for a broadcast station's main studio).

50. We affirm but clarify the standards for localism announced in the *NCE Order*. Applicants with a headquarters, campus, or 75% of board member residences within 25 miles of the reference coordinates of the community of license will be considered local. Governmental units will be considered local as well within their areas of jurisdiction. In the *NCE Order*, we specifically rejected as too broad a proposal to use 100 miles rather than 25 miles as our localism standard. We continue to view 25 miles as a reasonable distance applicable to all full service NCE broadcast stations for the reasons discussed therein. We decline to individualize the definition of "local" to vary with a particular station's technical capabilities, finding it preferable to apply uniform mileage standard. In this manner, an applicant needing to replace a resigning member of its local governing board will be able to make that decision based on easily understood mileage standards, without having to determine how the technical capabilities of the proposed station affects the localism of the new board member. The only instance in which the *NCE Order* individualized localism standards concerned governmental entities, in recognition of their broad accountability throughout their areas of jurisdiction. Due to recognizable extrinsic factors, such as where a person pays taxes and what school district he lives in, the government entity can readily identify whether board members live within the area of jurisdiction. As several petitioners note, however, our stated policy that governments are considered local throughout their jurisdiction was not incorporated into any rule. We agree that it would be useful to codify this policy into a rule, and hereby modify Section 73.7000 of our rules accordingly.

51. We disagree that it is too stringent to require an applicant without a local headquarters or campus to have 75% of its governing board members comprised of local residents to qualify for localism points. The Commission has discretion to exercise judgment in setting thresholds and drawing appropriate lines. *Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, 14 FCC Rcd 12,559, 12,590 (1999). We acknowledge that a percentage as low as 51% could constitute a voting majority and therefore exercise legal control of an organization. That is why we permit NCE television applicants that are not governments or schools to establish their basic eligibility by demonstrating that a simple majority of their board is composed of representative community elements.[33] Our point system, however, must distinguish between minimally qualified applicants and exceptionally qualified applicants. Reducing our comparative standard to a 51% local board would, in the case of television applicants, result in the award of points to all minimally qualified applicants, making the localism credit meaningless in television proceedings. Further, we believe that it is reasonable to require a high level of local Board membership – a super-majority rather than a bare majority – to qualify the applicant for a preference as an established local applicant. In our judgment, an NCE applicant Board comprised of 75% established local residents is likely to be familiar with local needs and interests, and also have

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[33] *See Ascertainment of Community Problems by Broadcast Applicants*, 41 Fed. Reg. 1372, 1384 (January 7, 1976). Although we no longer require formal ascertainment, the elements articulated in a "community leader checklist" continue to be used to determine whether NCE television applicants are broadly representative. *See NCE Notice* at n.27.

extensive ties to the community that will facilitate continuing interaction with the community. Equally important, that level of local Board membership is likely to assure a sufficient level of influence and control over policies and direction of the licensee such that the local Board members' familiarity with local needs and interests and continuing interaction with their community will be reflected in the station's policies and programming. With a 75% local Board, local members are likely to control station decisions even if one local board member is absent or abstains from a particular decision. Finally, we note that it is far easier for an applicant to establish local credentials by appointing local residents to its board than by maintaining a physical presence by means of a school or headquarters. Thus, there is a greater potential for abuse of the point system among applicants that establish their credentials by appointing local board members. Requiring 75% local board members, rather than a mere majority, reduces the potential for abuse of our process. Thus, we decline to reduce the level of local Board membership required to qualify for points as an established local applicant where the applicant has no local school campus or headquarters and is not a local government authority.

52. With respect to new organizations formed by local citizens, an organization in existence for less than two years prior to our "snap shot" date may be "local" but cannot be considered "established." Thus, it would not receive points as an "established local applicant." Comments received earlier in this proceeding indicated a concern that if the Commission did not set a minimum period of time for which an organization itself must be local, non-local organizations would likely engage in abuse by "renting" local citizens for their boards, or by setting up

new local corporations with "straw-men" local incorporators. It would be too difficult without a lengthy hearing process for the Commission to distinguish between such abusive "local" applications, and legitimate local applications. Thus, in adopting the requirement that organizations be "established" in the *NCE Order*, we stated that this requirement would serve to limit the feigning of local qualifications, to establish the applicant's educational credentials in a particular locality, and to foster participation by truly local entities in noncommercial educational broadcasting. Accordingly, we affirm our decision to grant localism points only to organizations that have been established in the community for at least two years prior to application, similar to the standard adopted for Low Power FM applications.[34] Regarding applications currently on file, the applicant must have qualified as a local applicant continuously for two years prior to the supplement date to be considered for points as an established local applicant. It cannot claim such a credit now by virtue of adding local citizens to its board, regardless of the length of time those citizens have lived in the community.

2. Technical Parameters

53. We adopted a credit for the applicant with the best technical proposal. Specifically, we determined that the applicant proposing to cover the largest area *and* population of all those in a mutually exclusive group would get 1 point if its proposed area and population is 10% greater than the next best proposal or 2 points if 25%

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[34] *Creation of Low Power Radio Service*, MM Docket No. 99-25, *Report and Order*, 15 FCC Rcd 2205, *mod'd on other grounds, Memorandum Opinion and Order*, 15 FCC Rcd 19,208 (2000).

greater than the next best proposal. Connecticut College Broadcasting Association asks if and how this standard will be applied to applications seeking modifications of existing facilities. In particular, it asks whether, among two applications for major modification, we would compare only the newly proposed coverage of the stations or their total coverage areas (existing coverage as well as proposed).

54. We clarify that factors in the point system are applicable to applications for major modifications of existing stations as well as to applications for new stations. When we examine a station's technical parameters, we will focus on the applicant's proposal. For modification applications, the proposal is the area of newly added service only. For new stations the proposal is the entire area to be served by the new station. We recognize that, as so viewed, a proposal for new service is much more likely to receive points for its technical parameters than a competing proposal to modify existing facilities. This result is consistent with our desire to provide additional service to as many people, living in as broad an area, as possible. Specifically, our grant of an application to construct a new station will bring a new signal to the entire area and population within the new station's service area, whereas our grant of a major modification brings new service to only a portion of the population within the modified station's service area.

3. Diversity of Ownership

55. Our point system awards two points for local diversity, *i.e.*, if the proposed station's principal community

(city grade) contour[35] does not overlap such contours of any other station in which the applicant, its parent, subsidiaries, or members of their governing boards, have any attributable interests. We stated that this point factor would enable the listening public to receive the viewpoints of different NCE broadcasters. We recognized that the governing boards of NCE entities change frequently, and that differences in attributable broadcast interests of incoming and outgoing board members create an uncertainty about whether an organization that qualifies for the credit today will be able to maintain diversity into the future. Accordingly, we stated that we would award credit for diversity only to applicants whose own governing documents require that diversity of ownership is maintained.

56. Two petitioners ask us to clarify the governing document requirement. First, Jimmy Swaggart Ministries asks us to clarify whether pending applicants can amend their governing documents now, and thus be considered for diversity points even if their governing documents did not contain such provisions at the time of application. As established above, for pending applicants, we will calculate the applicant's maximum points as of a "supplement date" to be announced by public notice. A pending applicant can claim points for diversity if, as of that supplement date, it has no stations with overlapping

[35] With respect to radio, the principal community (city grade) contours are the 5 mV/m for AM stations under Section 73.24(I), and the 3.16 mV/m for FM stations calculated in accordance with Section 73.313(c). With respect to television, a station's principal community (city grade) contour is either the 74, 77, or 80 dBu contour, depending on the particular channel on which it operates, as described further in Sections 73.684 and 73.685.

principal community contours, and it has included in its governing documents a provision to maintain that diversity in the future.

57. Next, we consider a question from the University of Kansas ("Kansas"), which asks us to clarify how an organization without traditional governing documents will be able to meet the governing document requirement. This question is relevant both to pending and future applicants. Unlike NCE corporations, governed by a constitution and bylaws that members or a board can readily amend, Kansas is organized by a state charter passed in 1863, and its operation is, in part, governed by state statute. Kansas maintains that any change would require an act of the state legislature. It requests an exemption from the governing document safeguard, and offers instead to certify that it will not apply for any facilities that create contour overlap with other facilities for which it has applied or has been authorized. It would agree that any failure to meet this requirement would result in dismissal of its future applications. It further argues that the governing documents provision is overbroad, because it could prevent applicants from applying for stations in proceedings where it is not seeking any diversity credit.

58. The governing document safeguard aims to maintain governing board characteristics for which the applicant received credit, even if the composition of that board and its attributable broadcast interests change due to resignation and replacement of board members. We do not believe that the requirement is overbroad. Applicants may word the language as they deem best for their organization. For example, they may specify that this future safeguard provision will become effective only if the applicant claims a credit for diversity and receives an

authorization as a result of that claim. Kansas' proposal to certify that it will not apply for additional stations does not fully address the purpose of the governing document requirement, because Kansas does not address the potential that future members of its governing board may hold or acquire attributable interests in broadcast stations licensed to others. We do, however, recognize that it might be very difficult for state-chartered organizations, like the University of Kansas, to obtain legislative amendments to their charter. While we will not exempt such organizations from providing a safeguard, we will consider alternative safeguards from such organizations if they reasonably assure that board characteristics will be maintained during the four-year holding period. For example, the University of Kansas states that it is governed by a Board of Regents appointed by the governor. We would consider a certification from University making a commitment to maintain the Board characteristics on which it bases its diversity claim, accompanied by a description of procedures it has in place to effectively notify appointing officials and board members, both current and future, of their need to act consistently with the University's diversity representations to the Commission. While it would be preferable and simpler to have the commitment in the organization's charter, if possible, we believe that in circumstances such as those that Kansas describes we can rely on appointing officials, who know of the organization's representations to the Commission, to make appointments consistent with those representations. We specifically limit the availability of this option to entities whose governing documents cannot be amended without legislative action.

4. State-wide Networks

59. The Commission has long recognized the value of state-wide networks of NCE stations operating pursuant to state-wide educational plans. State-wide networks have been pioneers in NCE broadcasting, particularly in television, ensuring that educational programming is available throughout an area in a coordinated and organized manner, especially to schools. We adopted a two-point credit in the *NCE Order* for state-wide networks serving large numbers of accredited schools, and repealed a rule that required more general consideration of applicant participation in state-wide plans. *See NCE Order* at ¶ 61 *citing* 47 C.F.R. § 73.502. We recognized that, due to the locations of the multiple school campuses or school districts they serve, state-wide networks may be unable to avoid overlapping signals, and thus may not be able to qualify for diversity of ownership points. By awarding an equal two-point credit for state-wide networks whose service to schools disqualifies them for diversity of ownership points, we intended to level the playing field. Thus, applicants providing service to many schools, that cannot do so without some signal contour overlap and resulting loss of the diversity credit, would not be placed at a disadvantage in comparison to applicants serving a smaller number of schools or serving general listeners in locations that, unlike schools, are not site-specific. The credit is available to public and private state-wide networks, as defined in 47 C.F.R. § 73.7003(b)(3). That rule generally requires that the applicant's stations will provide programming to 50 accredited full time elementary/secondary schools, or five accredited full time college campuses in a single state, in furtherance of the school curriculum. Several petitioners

urge us to either eliminate or modify our credit for state-wide networks. They object primarily to our inclusion of school curriculum in the definition of state-wide network and to the large number of schools that applicants must serve to qualify for the credit.

a. Curriculum

60. Educational Media Foundation (EMF) and Station Resource Group (SRG) seek elimination of the state-wide network credit. EMF believes that the credit amounts to a value judgment that instructional programming is better than general educational programming. It believes that the Commission is trying to limit the programming that an NCE station can broadcast, contrary to a recent decision in which the Commission withdrew advice on the types of programming that are educational. Station Resource Group opposes the credit on different grounds, arguing that virtually no radio broadcaster would qualify for the credit as currently defined, and that it would be preferable to substitute different, more readily available, credits. Colorado Christian University and West Coast Public Radio would retain the credit for state-wide networks, but would delete the requirement that programming be used in furtherance of a school curriculum. According to Colorado Christian University, 65% to 75% of its adult students enroll at the college after listening to non-curriculum programs on the radio. Several commenters argue that the credit is of more value to television applicants than to radio applicants because radio stations are not as readily used as an instructional medium as television stations.

61. As indicated, we adopted points for state-wide networks to recognize a compelling educational reason that some NCE applicants may not be able to achieve the desirable goal of local diversity, and to avoid disadvantaging those applicants under our point system. When service to large numbers of schools is the reason for an educator's inability to qualify for the "diversity" credit, our point system values service to schools equally with diversity of ownership. We disagree with EMF's view that favoring school-based education on educational broadcast channels favors government speakers over private and religious speakers. A wide range of speakers, public and private, religious and secular, operate schools. A wide range of broadcast programming can further the curriculum of such schools. Perhaps, as some parties note, some applicants that operate schools will not qualify for this credit, because they target their broadcast service at the broader public, do not use their stations in connection with their school curriculum, or operate only one school. Perhaps, as others contend, television applicants will be more likely to qualify than radio applicants will. None of these factors would diminish our commitment to this credit. We did not expect this to be a widely available credit, but rather a tailored credit meant specifically to counterbalance the disadvantage otherwise suffered by applicants that lose diversity points because they regularly provide curriculum service to large numbers of schools. If fewer radio licensees will qualify for the state-wide network credit, that is only because fewer such entities will suffer the disadvantage under our point system for which this credit is intended to compensate. State-wide networks have played a more prominent role in television than in radio, and thus it is not surprising that more television than radio applicants would qualify. Moreover, television applicants serving

schools may need this credit more than radio applicants may because television stations cover greater distances and have greater potential for overlap with co-owned stations.

62. We will not eliminate the inclusion of curriculum in our definition of state-wide networks. Under the non-curriculum-based credit urged by some commenters, any large system of schools or colleges would get the credit, regardless of whether its stations play any role in student education. The compelling reason for the applicant's inability to qualify for the diversity credit – the applicant's need to serve the schools – would no longer exist. The proponents of the alternative definition do not demonstrate that large schools that want to operate multiple stations for non-curriculum purposes should be treated any differently from other NCE applicants that want to operate multiple stations for non-curriculum purposes.

63. Connection to a school curriculum must be more than, as one petitioner suggests, a potential recruitment tool to attract students to attend a university. However, programming that furthers a curriculum need not be solely "instructional" *i.e.,* a broadcast of a teacher in a classroom. A college radio station operated by students as part of a class on broadcasting could also qualify regardless of the type of programming the students select. News or public affairs programming could further a curriculum if designed for use in a school to teach journalism or current events. Music and drama programs could be scheduled for use in a music or art appreciation curriculum.

b. Number of Schools Served within Contours of Overlapping Stations

64. Petitioners also ask us to adjust the number of schools that an applicant must serve to be considered for the credit. Station Resource Group believes that our numbers are arbitrary, failing to account for different sizes of student populations. It states, for example, that an applicant providing service to five small colleges would qualify for the credit, while an applicant providing service to 45 large high schools would not qualify, even if the high schools had more students than the colleges.

65. Colorado Christian University similarly asks that we loosen a requirement in the state-wide network credit concerning station contours. As adopted, the combined contours of the applicant's authorized stations and the one proposed station, must encompass the schools to be served. Colorado Christian asks that we consider the contours of all of the applicant's pending proposals. It maintains that applicants may want to serve large numbers of campuses, but that stations needed to cover those schools have not yet been authorized due to their mutual exclusivity with stations proposed by other applicants.

66. With respect to identifying an applicant's stations that will count as serving schools in our analysis, we will consider only existing authorizations, and the one proposed station under consideration. The diversity credit that we seek to counterbalance limits consideration to these same stations. As an applicant would not be disadvantaged by any other proposed stations for purposes of the diversity credit, we will not consider such proposals for purposes of the state-wide network credit. Further, while an educator may have applications pending to construct

additional stations that could serve more schools, it may or may not ever be authorized to operate such stations.

67. We clarify that the schools to be served need not be of a particular size, because the size of the student population served is not necessarily related to the applicant's inability to avoid overlapping service contours. We recognize, as SRG predicts, that there may be individual instances in which an applicant serving fewer students will receive a credit as a state-wide network over an applicant serving more students. Such a result is not troublesome because the state-wide network credit is not, for example, intended to promote service to colleges with large enrollments over colleges with small enrollments. Rather, we are making a distinction based on the number of campuses receiving broadcast service. A college that operates multiple stations to provide broadcast signals to each of its many campuses is more likely to experience overlap of its signals than another college in the same state seeking to provide broadcast service to fewer campus locations. Accordingly, to counteract any disadvantage in qualifying for a diversity credit, it is appropriate for the state-wide network credit to consider number of campuses rather than student population.

c. Small Institutions/Aggregation of Stations Licensed to Different Entities

68. We also clarify that even small schools and colleges with few campuses can qualify for the state-wide network credit if, through consortia arrangements, they will provide curriculum programming to schools in additional to their own. We make this clarification in response to concerns of Santa Monica Community College District

("Santa Monica") and the American Association of Community Colleges ("AACC"), which represents over 1,100 community colleges nationally. For example, AACC notes that although Rhode Island and Delaware community colleges operate pursuant to state-wide educational plans they each have fewer than five campuses. AACC also states that community colleges often are not part of the state university system, and that because the degree of centralized authority at the state level varies, there is some uncertainty over which schools individual community colleges could count within their network.[36] For example, Santa Monica operates only one college campus. It is concerned that it might not receive a state-wide network credit for future stations, because Santa Monica does not have authority over campuses licensed to other districts within California, and does not provide programming to any single institution with more than five campuses.

69. Community colleges or other small entities are not by virtue of size or organizational structure precluded from qualifying as state-wide networks, but the manner in which any particular organization might qualify for the credit will vary depending on such factors. First, if a central community college board or similar entity exerts control over individual districts, in the same manner that a parent entity controls subsidiaries that have their own

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[36] AACC identifies four categories of community colleges: (1) those that are part of the state university system; (2) those under the direct control of state community college board; (3) those in which control is divided between state boards and locally elected or appointed officials; and (4) those in which a local board has all governing authority, with a state board serving a general coordination and policy function. *Comments of AACC* at 5.

governing boards, the stations of any community college district in the state would be attributable to the same parent entity. If the applicant's stations encompass five campuses with a common parent entity, and are used in the curriculum of those campuses, it could qualify for the state-wide network credit. This might occur, for example, if one district has a particular expertise in broadcasting, and therefore sister districts choose to use the service of this district rather than to operate their own stations.

70. Alternatively, an applicant could qualify for the credit if its multiple stations are used in the curriculum of its own single campus and those of four separately operated college campuses, through an agreement with the separate colleges. For example, public and/or private four-year universities might regularly use a community college's broadcast programs that also relate to their curriculum. Similarly, a school district with fewer than 50 elementary and secondary schools could qualify for the state-wide network credit if it also will provide programming to a neighboring school district, if the requisite number of schools in both districts combined will use the programming in their respective curricula. Accordingly, we clarify that consortiums of schools coordinating broadcast programming for use in their respective curricula, and non-schools serving such consortiums, can qualify for the state-wide network credit pursuant to 47 C.F.R. § 73.7003(b)(3)(c),[37] if in the aggregate they serve five

[37] This rule section establishes the eligibility of "an organization, public or private, with or without direct authority over schools, that will regularly provide programming for and in coordination with [entities with the required number of schools/campuses] for use in the school curriculum." 47 C.F.R. § 73.7003(b)(3)(c).

college campuses or 50 elementary and/or secondary schools. Applicants cannot, however, aggregate colleges and elementary/secondary schools served. For example, an applicant serving four college campuses and ten high schools, will not be treated as equivalent to an applicant serving five college campuses. As colleges tend to be spaced further apart than lower level schools, it is not unanticipated that there would be several elementary/secondary schools within the vicinity of a college and vice/versa. Serving these additional schools would not generally require the applicant to cover a significantly larger area, and thus would not affect its ability to receive a diversity credit. Additionally, if the applicant is simply operating multiple radio stations to serve its own single campus and to reach the general public beyond its campus, without being used in a curriculum by the requisite number of schools, it would not be able to receive a state-wide network credit regardless of the number of schools that might happen to be located within its service area. In sum, applicants that provide curriculum service to the requisite number of schools, through arrangements with those schools, can claim a state-wide network credit even if all of the schools are not under one common authority.

E. Point Factors Not Selected/New Point Proposals

71. In the *NCE Order* we considered, but decided not to adopt, several other point system factors. A few petitioners urge us to reconsider factors previously rejected, or to consider adding new factors to the point system.

1. Local Program Origination and Other Localism Points

72. Broadcasting for the Challenged and National Federation of Community Broadcasters believe that we should provide credit for additional local factors beyond the established local applicant credit discussed above. BFTC states that it is inconsistent to award a credit for established local applicants, but not for local program origination by non-local applicants. It urges us to give three points to non-local applicants that intend to involve the local community in their stations, as a way to recognize that, in BFTC's opinion, community-minded non-local broadcasters are equivalent to those already present in the local community. Specifically BFTC urges us to award credits for applicants that would (a) establish local advisory boards; (b) employ 80% local employees; (c) train local interns and students; and (d) provide at least 50% locally produced programming. NFCB supports credits for local program origination as well. It notes that LPFM stations can receive points for local program production, and states that LPFM service is not a substitute for full service local programming. NFCB argues that a credit for locally produced programming would be consistent with Commission and court cases supporting local program origination and believes that the *NCE Order* does not adequately explain the reason for departure from an existing policy. Further, NFCB would award points to stations that are locally funded, which it believes is a good indication of community support, and for use of local talent or provision of airtime to local residents, which it believes will increase diversity of viewpoint. Community Television, Inc. opposes these suggestions. It views our existing localism points as disfavoring religious-oriented broadcasters, and argues

that adding more localism factors would be entirely unsupportable.

73. With respect to BFTC's suggestion of awarding points to a non-local applicant planning to provide community service, we note that the various steps that BFTC identifies may be helpful to non-local applicants in efforts to learn about the community's educational needs and to maintain good community relations. We decline, however, to award points based on an applicant's mere intention to implement such procedures. BFTC's suggestions involve plans for the future, and are not readily verifiable upon application. An applicant with the best of intentions may fail to live up to such promises if, for example, it finds that there are insufficient local residents skilled in broadcasting and thus it cannot fulfill its earlier plan to hire locally. We believe that it is better policy to award points for factors that can be verified at the time of application. Further, the record before us does not identify non-local NCE licensees that have instituted such policies in the past or provide information about the service records of any such stations. Thus we do not have a sound basis on which to conclude that non-local applicants would provide service equivalent to local applicants if the former were to establish local advisory boards, employ local residents, or train local interns and students. Nor does it appear to us that any of those mechanisms would ensure that a station's service is responsive to local community needs and interests to the same extent as if the licensee were awarded to a locally based organization. Accordingly, we will not adopt BFTC's suggestion.

74. NFCB's proposed credits for local programming, public access, and local funding are similar to proposals considered but rejected in the *NCE Order*. We decline to

adopt those factors for the reasons stated therein. Given the difficulties in receiving financial backing for a non-profit venture like construction of an NCE station, applicants should have the flexibility to finance construction using whatever sources, local or non-local, are available. Similarly, full service NCE applicants should have the flexibility to air the programming that they conclude will best serve the needs and interests of the community, whoever produces it, and wherever that production takes place.

2. Radio Reading Services

75. West Coast Public Radio suggests that we award two points to FM applicants that would make their subcarrier frequencies available to organizations that provide reading services for the blind. NFCB, while acknowledging the good work of radio reading services, opposes this suggestion because the proposal does not take into account whether reading services in an area need more outlets to transmit their services, or whether existing options are already adequate. We agree with NFCB's critique. We also note that radio reading services are but one of many possible ways which FM subcarrier frequencies might be used to address a community need. For example, such frequencies can also be used to provide foreign language programming. Further, regardless of whether subcarriers are used for radio reading services or other worthwhile endeavors, subcarrier signals are not received by the general public, but only by a distinct subset of listeners with specially designed receivers. Therefore, to establish a credit for radio reading services, we would need to conclude that reading services are superior to all other possible subcarrier uses, and that subcarrier service requiring

special receive equipment deserves points similar to radio service that everyone can receive. Such conclusions are not supportable under the current record. Thus, we will not award any points for this factor.

F. Tie Breakers

76. In the *NCE Order* we recognized that some mutually exclusive applicants might qualify for equal points. For such scenarios we established tie breaker mechanisms. If applicants differ in terms of their number of existing authorizations, we would award the permit to the applicant with the fewest authorizations. If that factor fails to break the tie, we would select the applicant with the fewest pending applications. If applicants nevertheless remain tied, and are unable to settle among themselves, we instituted mandatory time sharing as a tie breaker of last resort for full service stations.

77. Several commenters object to our tie breakers. Broadcasting for the Challenged argues that an applicant's distant stations and applications are irrelevant because they have no impact on the proposed station or local listeners. Station Resource Group argues that our tie breakers are inconsistent with our recognition elsewhere of the benefits of centralized NCE operations, and with our grant of main studio waivers. Educational Media Foundation is concerned that a speculative applicant without any existing stations would prevail over an existing broadcaster with stations in a different part of the country. It also questions the propriety of counting stations without considering the size of the communities served. It gives as an example, a tie breaker between an applicant with one existing station serving a million people, and a competing

applicant with two stations serving rural areas with far fewer people combined. EMF argues that we should not favor the first applicant just because it has fewer stations, as it would be inaccurate to consider the first applicant as having a more limited opportunity to air its viewpoint to the public. NFCB, while supporting our tie breakers based on authorizations and applications, objects to use of time sharing as a tie breaker of last resort. It views mandatory time sharing as an abdication of the Commission's responsibility for choosing among applicants, which aims to force applicants into private negotiations among themselves.

78. We acknowledge that the tie breaker selection factors highlight relatively minor differences between applicants. We also acknowledge that mandatory time sharing is unpopular and can be difficult for applicants with different missions, philosophies, or formats. Thus, these factors are considered only as tie breakers among applicants that are equally qualified under the primary selection factors. As tie breakers, these factors are fair. An applicant with more stations than its competitor already has more outlets to air its viewpoint and programming. It would be unnecessarily complex to compare for tie breaking purposes whether any of those stations are superior to others in terms of coverage or population served. Moreover, it is an efficient use of limited spectrum to award a permit to the applicant that applies in a few carefully chosen areas most suitable to its educational goals. An equally qualified applicant that has additional applications pending for other locations has more options available to it. As a last resort, time sharing recognizes the equal qualifications of applicants that have survived several tie breakers by giving the applicants partial, but equal, authority to broadcast. It has been a longstanding

Commission practice to use time sharing to break ties in comparative broadcast cases, and we do not consider it an abdication of responsibility. *See, e.g., Southeastern Bible College, Inc.*, 85 FCC 2d 936 (Rev. Bd. 1981).

79. Whatever shortcomings our tie breakers may have, the petitioners suggest no better alternatives. The only alternative presented is a tie breaker lottery. As noted in the *NCE Order*, the statute governing our use of lotteries requires that substantial preferences be given in lotteries for minority control, a requirement that may well be challenged on constitutional grounds, resulting in litigation that would delay the award of licenses under our new procedures. Such additional delays would be particularly intolerable after the prolonged delays in processing NCE applications due to the comparative hearing freeze. Further, we do not see how use of a lottery, a process of random selection, is likely to result in the licensing of the applicant best qualified to serve its proposed audience, the factor that the petitioners argue is lacking in our chosen tie breaker system. Accordingly, we affirm our tie breaker system.

G. Attribution of Full Service and Translator Stations

80. Because several factors in the NCE point system, including diversity of ownership, localism, and tie breakers, are based on whether the applicant also has interests in other broadcast stations, we established attribution rules for NCE organizations. These rules are similar to those applicable to commercial broadcasters, attributing the interests of the applicant, its parents, and its subsidiaries, their officers and members of their governing

boards. To implement these attribution standards we modified Section 73.3555 of our rules concerning ownership. The rule, which previously stated that none of its provisions applied to NCE applicants, now says that the rule, including its attribution provision, is applicable to NCE applicants to the extent that they are compared pursuant to Subpart K, which sets forth our new comparative criteria.

81. DeLaHunt Broadcasting states that the relevance of attribution to NCE applicants is not limited to the point system in Subpart K. For example, it notes that Subpart G, which governs the low power FM (LPFM) service, provides that a party with an attributable broadcast interest cannot hold an attributable interest in a low power FM (LPFM) licensee. DeLaHunt also believes that Subpart I, governing auctions of non-reserved channels, counts attributable interests in noncommercial stations for determining whether an applicant qualifies for a noncommercial bidding credit. In amending the notes to Section 73.3555, we meant to clarify that commercial attribution standards also apply to NCE stations, to the extent that attribution is relevant to such stations. Attribution is certainly relevant for Subpart K, but we should have included it as an example only. Accordingly, we will now modify Section 73.3555 to use Subpart K as an example only. Whenever attribution issues are relevant for NCE purposes, the standards in Section 73.3555 will apply.

82. Educational Communications of Colorado Springs asks whether the Commission will provide attribution relief similar to that provided to commercial entities, in considering the attributable interests of officers

and directors whose responsibilities are wholly unrelated to broadcasting.[38] For example, it notes that an officer of an NCE applicant may sit on the board of a university or church whose primary mission is distinct from broadcasting, but which may have a broadcast station. Educational Communications of Colorado Springs believes that the officer should be relieved from attributable interests if he is willing to recuse himself from the secondary broadcast-related business of the other organization. As a safeguard, it proposes that an officer no longer willing to recuse himself on one board, must resign from the other.

83. We clarify that the commercial attribution principles contained in the notes to Section 73.3555 are generally applicable to NCE applicants for comparative purposes. The specific provision to which the petitioner refers, 47 C.F.R. § 73.3555, n.2(h), establishes that if an entity engages in a primary business other than broadcasting, applicants may request that the Commission waive attribution for any officer or director of the company whose responsibilities are wholly unrelated to broadcasting. NCE applicants may similarly request waivers, asking us to find as non-attributable an officer's position with another entity because it has demonstrated that the officer's duties and responsibilities with that entity are wholly unrelated to that entity's broadcast business. Applicants should indicate the points for which it would qualify both if the waiver were granted and if the waiver were denied, so that we will not need to request additional information from the applicant.

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[38] *See* 47 C.F.R. § 73.3555, n.2(h).

84. We also clarify *sua sponte,* the extent to which applicants should count translator stations in determining local diversity and tie breaker matters. The text of the *NCE Order* and the full service rules adopted therein, generally reflect our intent that for determining local diversity points we will consider overlap of the proposed station with attributable NCE and commercial stations, "comparing radio to radio and television to television." *NCE Order* at ¶ 35; 47 C.F.R. § 73.7003(b)(2). Similarly, for tie breakers, they state that we would consider the number of an applicant's existing authorizations and applications "in the same service (radio or television)." *NCE Order* at ¶72; 47 C.F.R. § 73.7003(c)(1). *See also* 47 C.F.R. § 73.7003(c)(2) ("same service"). We note, however, that tie breaker language elsewhere in the document could give a mistaken impression that we intended translator stations to have no tie breaking impact on full service stations and vice versa. *See NCE Order*, n.59; Appendix A (Tiebreaker A); 47 C.F.R. § 74.1233(e)(3).[39] Accordingly, as discussed below, we clarify our intent.

85. In applying for a reserved channel station, whether full service or FM translator, the radio applicant generally should include its translators for purposes of determining diversity points and tie breakers. It would report all attributable commercial and noncommercial radio stations: AM, FM, and non-fill-in FM translators, *i.e.*, translators that extend the area of a full service

[39] Footnote 59 and rule section 74.1233(e)(3), could be understood as considering translators other than fill-in stations for purposes of tie breakers only in connection with an application for another non-fill-in translator station. The tie breaker summary in Appendix A might be read to exclude translator and AM stations.

station.[40] We will recognize an exception to this principle, however, for any radio translator licensee that, in the particular application involved, is seeking a full service station to replace its existing translator station(s). Such applicants may exclude, on that application, any existing translator station that will cease operating when the proposed full service station commences operation. We will, however, permit full service television applicants to exclude TV translators and Low Power Television (LPTV) stations when reporting attributable commercial and noncommercial TV stations. As a result of the transition from analog to digital television, translators may be an important resource in resolving interference issues, and we do not wish to preclude that possibility until that matter has been addressed. Due to the impact the transition to DTV has on LPTV and TV translator stations, we will not require full service television applicants to count LPTV or TV translators. Accordingly full service TV applicants applying for reserved channels should report all attributable commercial and noncommercial television stations: UHF and VHF, and Class A, but excluding TV translators and LPTV stations.

[40] It generally should not count fill-in FM translator stations, which simply fill dead spots in the contours of the applicant's full service station. Only if the radio applicant is specifically seeking a fill-in translator station should the applicant report its number of other fill-in stations, to be used in the event that we receive mutually exclusive fill-in proposals.

H. Application Processing Issues

1. General Procedures

86. The manner in which we will process applications is relevant both to pending applications and future applications. For pending reserved channel applications in closed groups, which are not subject to additional competing applications, the staff has already reviewed these proposals for mutual exclusivity only and has determined the members of each closed group.[41] As described previously, these applicants will need to supplement their applications to provide point information. As to future applications, in the *NCE Order* we decided to open short filing windows periodically. These applications will be filed on a new Form 340, which asks for the information needed to determine the points for which an applicant would qualify. All applications received during a particular window will be examined initially for mutual exclusivity only. As described above, and for the first filing window only, the staff will examine for mutual exclusivity any applications filed prior to adoption of the *NCE Order*

[41] Specifically, there are 439 groups of reserved channel full service FM applicants, consisting of 1,356 applications, and 31 groups of reserved channel television applicants, consisting of 89 applications. There are 43 groups of FM translator applicants, consisting of 97 applications. Our preliminary studies only identify mutual exclusivity between applications of the same type, and not, for example, whether proposals in FM translator applications are consistent with facilities proposed in full service FM applications. Additionally, full service FM applications were studied based on technical rules in place at time of filing. Specifically, the staff did not consider technical changes in the protection ratios adopted in *Streamlining or Radio Technical Rules*, MM Docket No. 98-93, FCC 00-368 (November 1, 2000), untimely amendments, or post April 21, 2000 amendments.

which are still subject to competing applications, along with applications filed within the first window.

87. After analyzing mutually exclusive applications under our new comparative standards, the Commission will issue an order or decision letter announcing the tentative selectee in a particular proceeding.[42] As we will have initially examined applications for mutual exclusivity only, we will consider whether any tentative selectee's application (FCC Form 340 or 349) has defects. If found acceptable, we will announce that fact by a public notice generated by the Consolidated Database System (CDBS) entitled "Broadcast Applications." Petitions to deny the application must be filed within 30 days following release of the Broadcast Applications Public Notice announcing acceptance of the application at issue. Interested parties should monitor these Broadcast Applications public notices. If a tentative selectee's application has acceptability defects, it will be returned so that the applicant may have one opportunity to cure the defect. If the defect is cured consistent with the standards for acceptable applications the staff will generate a public notice via CDBS, triggering a 30-day period for petitions to deny. Failure to correct the defect, however, will render the application unacceptable and we will proceed to tentatively select the

[42] As discussed in the *NCE Order*, use of the point system is considered a simplified hearing and the Communications Act does not yet allow the Commission to delegate authority over NCE point hearings to the staff. *See* 47 U.S.C.§ 155(c). Thus, initially, these matters will be referred to the Commission. The Commission, as suggested by Station Resource Group, will request Congressional authority to delegate these matters to the staff similar to that received when point systems were used in the Instructional Fixed Television Service.

applicant with the next highest number of points. So that interested parties may verify or dispute the tentatively selected applicant's point tally, we would require applicants to file documentation of their point claims at the time of application both in their local public inspection files and with the Commission. The staff also would conduct random audits of points claimed. Other than specifying these broad guidelines, we did not establish processing procedures either for pending or future applications, instead delegating that responsibility to the Mass Media Bureau. Several petitioners ask us to clarify or establish additional processing requirements and guidelines, which would be generally applicable both to pending and future NCE applicants.

88. First, we consider a request from Spring Arbor College, which asks us to clarify that we will enable competing applicants to act as private attorneys general, disputing a tentative selectee's claims, rather than just conducting random audits. We clarify that the applicant's documentation, as specified and submitted in accordance with the instructions to the NCE application, Form 340, will be available for public review. Interested parties can provide useful analysis of such information in the context of petitions to deny or informal objections filed in response to public notices announcing our choice of tentative selectees. For example, if our tentative selectee claimed points as a state-wide network, it would have been required to provide information about the schools to be served. Interested parties will be able to examine the basis for the applicant's certification, and thus may independently verify, for example, whether the schools served operate full time and are accredited, as required. In addition, the

Commission will randomly conduct audits of the information submitted. The process adopted thus provides reasonable assurance that the statements made will be verified for accuracy, either by competing applicants, the Commission, or the general public.

89. Next, we consider two petitions asking us to specify the processing order of applications. Station Resource Group, which focuses on pending applications, suggests a chronological order, resolving the earliest groups to file before considering later filed pending groups. University of Northern Ohio ("Northern Ohio"), whose views raise issues relevant to all applications, suggests geographical processing, and would only use chronology if there were two groups of applications for the same city. In support of this position, Northern Ohio states that local competing applications may be in conflict with a distant co-channel operation and that, by approaching the applications geographically, we could maximize the number of licenses awarded. For example, it maintains that in a situation where there is a chain of mutually exclusive applications, it is possible that applications at either end of the chain would not be mutually exclusive with each other, except for the existence of the middle applicant(s). Northern Ohio asks us to resolve the middle applications first, and then, if the resolution of that situation removes a conflict with another proposal, to grant that other proposal as well.

90. We do not believe that it is appropriate or necessary at this time to specify in the abstract a particular processing order, *i.e.*, the order in which we will resolve the mutually exclusive groups of NCE applications on file or the order in which we will analyze any particular

applications within those groups. We will process applications in a manner that will be most administratively efficient and that will be most likely to result in selection of the best qualified applicants as judged by the point system adopted in this proceeding. In that regard, we note that, while the "upside" of Northern Ohio's "geographic" proposal is that it may permit the selection of more than one applicant from any single mutually exclusive group, it also has a clear "downside." Specifically, after the best qualified applicant is selected, it is possible that remaining applicants that are not mutually exclusive with this primary selectee and thus potentially secondary selectees, may also be significantly inferior to other applicants that are eliminated because they *are* mutually exclusive with the primary selectee. Rather than issue authorizations to applicants whose potential for selection stems primarily from their position in the mutually exclusive chain, we believe it is appropriate to dismiss all of the remaining applicants and permit them to file again in the next filing window.

2. Procedural Issues For Future Window Applications

91. Station Resource Group and West Coast Public Radio raise processing issues relevant specifically to applications filed in future windows. First, to limit potential speculation, they ask us to limit to five or ten the number of applications that any organization may file in a single filing window. Second, they ask us to commit to open at least one window, scheduled to coincide with the due date of funding requests to the Public Telecommunications Funding Program (PTFP), which is administered by the National Telecommunications Information Agency

(NTIA), and upon which many NCE applicants rely. Because NTIA accepts funding requests only once a year, and requires their applicants to indicate that they have filed a broadcast application with the Commission, some organizations are concerned that they may lose the opportunity to apply in an NTIA funding cycle if we do not open an application filing window immediately before NTIA applications are due.

92. The suggestion to limit the number of applications submitted in any particular filing window is essentially the same as one that was considered but rejected in the *NCE Order*. *NCE Order* at ¶¶ 85-86. We did not believe that such limits were needed to prevent speculative applications, because other aspects of our new procedures, including the window procedure itself and a four-year holding period, serve to discourage speculation. Further, the tie breaker mechanism favors applicants with fewer applications. We do, however, reserve the right to establish such a limit in the future by public notice, if the number of applications filed exceeds our expectations. Petitioners do not provide persuasive reasons for changing our decision at this time.

93. With respect to funding, we appreciate concerns of commenters that need to apply to the Commission in time to also apply for funding available from another agency. The Commission and its staff are well aware of the importance of PTFP funding, especially to smaller organizations that could not construct a station without this program's financial assistance. Our staff therefore has always coordinated closely and in a timely manner with NTIA staff to ensure that both agencies can fully consider the applicants' related proposals. We expect that coordination between the Commission and NTIA will continue and

will result in the opening of sufficient Commission filing windows for applicants to meet the requirements of NTIA.

3. Terminated Hearing Proceedings

94. In the *NCE Order*, we terminated "any traditional comparative hearing proceedings to which a noncommercial educational applicant is a party." *NCE Order* at ¶ 129. Jimmy Swaggart Ministries ("Swaggart") and Real Life Educational Foundation of Baton Rouge, Inc. ("Real Life"), which are mutually exclusive with each other and have already been through a comparative hearing in MM Docket No. 88-308, ask for clarification of the process that will apply to former hearing applicants. Real Life believes that the prior hearing process has been replaced by a point system which will apply to such applicants, while Swaggart maintains that it would be inefficient and unfair to completely discard the results of hearings that have already taken place.

95. We believe that the proceeding between Real Life and Swaggart is the only pending proceeding that was once subject to a full evidentiary hearing. That case is essentially before us for a new initial selection among the applicants. We will apply a point system to that proceeding, identical to that applied to all other pending applications for which no initial selection was made prior to the effective date of the point system.[43] Although not specifically suggested by Swaggart or Real Life, we considered

[43] We generally will not apply the point system to any comparative FM translator proceedings for which we made initial selections before the August 7, 2000 effective date of the point system. Any requests for reconsideration of those decisions will be examined under the rules in effect at the time of the initial selection.

the possibility of using the old hearing results as a final tie breaker, in the event that the hearing parties are found otherwise equal under the point system and the usual tie breakers set forth in 73.7003(c) do not result in a winner. However, given the vagueness of our former hearing standards, we cannot say with a certainty that such result would be better than time sharing, the ultimate tie breaker that would otherwise resolve the matter. In fact, the hearing case between Real Life and Swaggart was one which was an impetus for revamping the standards for comparing NCE applicants, with the Review Board finding very little distinguishing among their proposals under the vague hearing criteria then in effect.[44] Accordingly, the pending Real Life and Swaggart applications will be considered under the new point system in all respects.[45]

I. Settlements

96. We briefly discussed settlements in the *NCE Order*. We stated that settling parties would be limited to reimbursement of their reasonable and prudent expenses. We also stated that we would not "adopt a formal settlement period, so as not to unduly delay the award of points in cases where the parties are not interested in settlement, but stress that parties are free to settle at any time during the process." *NCE Order* at ¶ 74. *See* 47

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[44] *See NCE Order* at ¶ 5, *citing Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577, 2580, n.8 (Rev. Bd. 1991).

[45] *See Community Television, Inc. v. Federal Communications Commission*, 216 F.3d 1133, 1143 (D.C. Cir. 2000); *Chadmoore Communications, Inc. v. Federal Communications Commission*, 113 F.3d 235, 240-241 (D.C. Cir. 1997) (application of rule changes to pending applications is not considered retroactive rulemaking).

C.F.R. § 73.7003(d). Although pending NCE applicants have been able to settle with each other for a considerable time, both before and after the *NCE Order*, few have filed settlements. To foster settlements, the University of Kansas believes that we should provide for existing applicants to amend out of a mutually exclusive group by specifying any other available channel for which no one has applied. It asks us to modify Section 73.3573 of our rules to consider such action as a minor change. Kansas believes that such action would be consistent with 74.1233(e)(2) used to resolve mutually exclusive FM translator applications.

97. We do not adopt Kansas's proposal because it would preclude other full service applicants from applying for the available frequencies in the next filing window. Under existing rules, an applicant may make engineering changes to bring about a settlement if the change is "minor", *e.g.*, proposing to move to an adjacent channel. 47 C.F.R. § 73.3573. Because existing stations can also file applications for minor changes outside of filing windows, minor changes to pending applications made outside of filing windows do not adversely affect the rights of existing licensees. In contrast, the settlements based on major changes that Kansas proposes could preclude existing stations from filing major changes in the next window. We will not permit this. If the applicant that desired to make the major change to its proposal does not prevail in a point proceeding, it may file its alternate proposal in the next filing window, subject to competition from any additional applicants with similar plans for that channel. We recognize that our rules are more lenient, in this regard, for FM translator stations. Translators are secondary services, however, and thus allowing a translator to amend to

another channel does not have a preclusive effect on future applicants for full service stations.

98. We will, however, provide additional clarification of the settlement policies that will apply to mutually exclusive NCE groups.[46] Settlement of NCE proceedings can be beneficial both to applicants and to the Commission. Applicants are able to achieve a solution that is most acceptable to the parties, and the Commission is able to conserve the resources we would spend to select among them. Two types of settlement agreements will be acceptable: universal settlements and technical settlements, each of which allows immediate grant of an authorization. Universal settlements resolve the claims of all applications within a mutually exclusive group. Technical settlements make it possible, by means of minor engineering changes, for one applicant to remove itself from the group on the four corners of its own application without affecting the viability of any other applicants. Thus, through a technical settlement, the Commission can authorize one

[46] The settlement discussion herein does not affect the rights of any NCE television applicants that by July 17, 2000, filed settlements pursuant to the procedures set forth in DA 99-2605 (as extended by DA 00-536), which permitted applicants on television channels 60-69 and applicants in television freeze areas to settle their mutually exclusive applicant groups, to file petitions for rulemaking specifying a new "core" television channel (between 2 and 51) and/or to amend their applications to provide the requisite interference protection to the digital television Table of Allotments. For those applicants, we will consider the settlement agreements and technical proposals already on file. *See* "Mass Media Bureau Announces Window Filing Opportunity For Certain Pending Applications and Allotments Petitions for New Analog TV Stations," *Public Notice*, DA 99-2605, released November 22, 1999; and "Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations Extended to July 15, 2000," *Public Notice*, DA 00-536, released March 9, 2000.

applicant immediately, while also considering later which of all of the other applicants should build a second NCE station. An example is a unilateral action or agreement between applicants at the end of a chain, making it possible to grant one of those applicants, while not affecting the rights of the others to compete. We will not accept partial settlement agreements such as those in which applicants withdraw from one proceeding in return for the promise of a competing applicant to withdraw from another proceeding, but fail to achieve any grantable application or to settle with the remaining applicants in each group. Such settlements potentially prejudice the remaining non-settling applicants. Partial settlements also encourage applicants to eliminate the best competing proposals without any resulting public benefit such as faster initiation of service. Considering proceedings with partial settlements would not take any less time, and could actually take longer because the settlement creates a two-step process for the Commission (acting on the settlement and comparing the remaining group or groups of applicants) instead of the one-step process of comparing all of the applicants.

99. Finally, for a short period ending with the date on which existing groups of mutually exclusive NCE applicants must file supplements to claim points, we will entertain settlement agreements that exceed the applicant's reasonable and prudent expenses. We have been unable to process mutually exclusive NCE applications since 1995 due to the lack of workable NCE comparative standards. Under similar circumstances, we permitted competing ITFS applicants to settle without any limitations on payments to withdrawing applicants. *See First Report and Order, Competitive Bidding,* 13 FCC Rcd

15920, ¶ 206 (1998). We believe that our consideration of such settlements among closed groups of NCE applicants will facilitate resolution of these long-frozen comparative initial licensing proceedings. Thus, by the date that the staff announces for the acceptance of supplemental filings, applicants will file either supplements to claim points, universal settlements resolving the entire group, or technical settlements providing for the grant of an application as a result of minor engineering changes. Any applicants that have settlement agreements already on file pursuant to previous settlement policies may continue to pursue those settlement agreements, but have an affirmative obligation to submit a written statement to the staff by the supplement date referencing the pending settlement. Applicants with neither a settlement nor supplement on file by the supplement date will be dismissed. For settlements received by the supplement date, the Commission will waive any of its rules, such as 47 C.F.R. § 73.3525(a)(3), that preclude the receipt of any money or other consideration in excess of legitimate and prudent expenses in exchange for the dismissal of an application, but due to the nature of the NCE service we will not waive our policy against "white knight" settlements involving non-applicant third parties. This is a one-time opportunity. We do not envision waiving our rules beyond the period provided herein. Thus, while we always encourage settlements among NCE applicants, any settlements filed after the deadline for point supplements will be subject to the monetary limits in our rules.

V. PROCEDURAL MATTERS AND ORDERING CLAUSES

100. As required by the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, a Supplemental Final Regulatory Flexibility Analysis has been completed and is attached as Appendix C hereto.

101. Authority for issuance of this Memorandum Opinion and Order is contained in Sections 4(i), 303(r), 403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 403, and 405.

102. The actions taken in this Memorandum and Order have been analyzed with respect to the Paperwork Reduction Act of 1995, and found to impose no new or modified reporting and recordkeeping requirements or burdens on the public.

103. Accordingly, IT IS ORDERED that the petitions for reconsideration and clarification listed in Appendix A ARE GRANTED to the extent provided herein and otherwise ARE DENIED pursuant to Sections 4(i), 303(r), 403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 403, and 405, and Section 1.429(i) of the Commission's rules, 47 C.F.R. § 1.429(i).

104. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Memorandum Opinion and Order including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

105. IT IS FURTHER ORDERED that the Commission's rules ARE AMENDED as set forth in Appendix B. IT IS FURTHER ORDERED that the provisions of this

Memorandum Opinion and Order and the rule amendments set forth in the Appendix SHALL BE EFFECTIVE 30 days following publication in the Federal Register.

106. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

107. For additional information concerning this proceeding, contact Irene Bleiweiss, Mass Media Bureau, Audio Services Division, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

SEPARATE STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH

In re Reexamination of the Comparative Standards for Noncommercial Educational Applicants Memorandum Opinion and Order in MM Docket No. 95-31

I write today to acknowledge the constitutional concerns expressed by religious broadcast advocates, such as the Educational Media Foundation, in this proceeding. As I have stated before, the Commission must be diligent in crafting rules that fully respect the spectrum of freedoms guaranteed to all Americans under the First Amendment of the United States Constitution. While the point system refinements adopted by the Commission today are not perfect, they are in the main, speaker and subject matter neutral. Suffice it to say, the point system is far more preferable, and less constitutionally suspect, than the

comparative hearing process, a lottery system, or any other existing regulatory mechanism in selecting among competing applicants for broadcast services on channels reserved for noncommercial educational use.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	) MM Docket No. 95-31
Reexamination of the Comparative Standards for Noncommercial Educational Applicants	)

REPORT AND ORDER

Adopted: April 4, 2000 **Released: April 21, 2000**

By the Commission: Commissioner Furchtgott-Roth and Tristani approving in part, dissenting in part and issuing a joint statement; and Commissioner Tristani issuing a separate statement.

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I. INTRODUCTION

1. The Commission hereby adopts new procedures to select among competing applicants for noncommercial educational ("NCE") broadcast channels. The new selection process replaces a subjective comparative hearing process that has been used for the past thirty years. We believe that the new system will be faster and less expensive than the former system but will continue to foster the growth of public broadcasting as "an expression of diversity and excellence, and . . . a source of alternative telecommunications services for all citizens of the Nation." 47 U.S.C. §396(a)(5).

2. The new system will use points to compare objective characteristics whenever there are competing applications for full-service NCE radio or television stations on channels reserved for noncommercial educational use. The point system will also be used, but to a more limited extent, to evaluate competing applications for NCE-FM translators. On non-reserved channels, we will generally use auctions to select among competing applications, even if NCE applicants are among the competitors. We have determined that we are not precluded from using auctions when an NCE entity applies for a commercially available channel, and that the use of auctions on commercially available channels best reconciles conflicting directives in the statute. We will, however, provide additional opportunities for NCE entities to demonstrate – prior to filing an application – that a non-reserved channel should be reserved, and therefore not subject to auction. To make such a demonstration, the NCE entity will need to show that there is a greater need for permanent noncommercial educational service than for commercial service in its proposed service area.

3. For NCE radio station applications for frequencies on the reserved band, which can be mutually exclusive even if they specify different communities, we will first determine whether award of an NCE radio station to one locality over another would best achieve the goal of fair distribution of frequencies, and proceed to a point system only if this threshold issue is not dispositive. *See* 47 U.S.C. § 307(b). For mutually exclusive NCE television station applications, which are always for the same community due to the use of a television table of allotments, we will proceed directly to a point system. Under the new point-based selection process, we will award a construction permit for NCE radio and television stations to the applicant that receives the most points, with points awarded for local diversity, technical superiority, localism, and state-wide networks. If a tie results, and the parties are unable to settle among themselves, we will break the tie by awarding the permit to the applicant with the fewest existing authorizations and, if that fails to break the tie, with the fewest number of outstanding applications. For purposes of applying the point system, interests of related organizations and officers will be attributable to the applicant. As the point system is technically considered a form of comparative hearing, and hearings generally must be conducted by Administrative Law Judges or by the Commission, we will seek legislative authority to delegate responsibility for conducting the point system to our staff. In response to suggestions from commenters concerned about past abuses in the NCE licensing process and potential abuse in a process based on a point system, we will accept applications during filing windows, instead of using the current "A/B cutoff" method, and establish a four-year holding period for permits awarded through comparative consideration. To facilitate the transition to

the new NCE application process, we will implement a temporary filing freeze on applications for new and major changes to existing NCE stations.

II. BACKGROUND AND HISTORY

4. As fully described in the Further Notice of Proposed Rulemaking in this proceeding ("Further Notice"), 13 FCC Rcd 21167 (1998), the broadcast spectrum is divided into "reserved" and "non-reserved" channels. The reserved channels are for noncommercial educational use only, while the non-reserved channels are for all types of broadcasting, commercial and noncommercial. From the earliest days of broadcasting, and for both reserved and non-reserved spectrum, the Commission used traditional evidentiary hearings to select among competing applicants. The factors considered in hearings for reserved spectrum differed, however, from those used on nonreserved spectrum. In comparative hearings for reserved spectrum, the primary decisional factor used to choose between applicants proposing to serve the same community was "the extent to which each of the proposed operations will be integrated into the overall educational operations and objectives of the respective applicants." *See New York University*, 10 RR 2d 215, 217-18 (1967). In comparative hearings for non-reserved spectrum, the Commission developed a variety of comparative criteria, including the "integration" of ownership and management, which presumed that a station would offer better service if its owners were involved in the station's day-to-day management. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). If NCE applicants applied for non-reserved channels, all applicants – NCE and

commercial – were evaluated using the commercial criteria.

5. Interest in changing the comparative selection process both for NCE and commercial stations dates back to the early 1990's. First, the Commission's Review Board described the NCE hearing criteria as "vague" and "meaningless," and indicated that it was often difficult to make a rational choice in noncommercial licensing cases. *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577, 2580, n.8 (Rev. Bd. 1991). Shortly thereafter, a federal court held that the core integration criterion used to evaluate non-reserved applications, was "arbitrary and capricious, and therefore unlawful." *FCC v. Bechtel*, 10 F.3d 875, 878 (D.C. Cir. 1993) (Bechtel II). As a result, we initiated a broad inquiry into possible changes to the selection processes for both commercial and noncommercial broadcasters.[1] The Commission froze all ongoing comparative cases pending the establishment of new criteria. *See Notice of Proposed Rulemaking*, MM Docket No. 95-31, 10 FCC Rcd 2877, 2879 (1995) (*Notice*) (reserved channels); Public Notice, FCC Freezes Comparative Hearings, 9 FCC Rcd 1055 (1994), modified, 9 FCC Rcd

[1] *See Notice of Proposed Rulemaking, Reexamination of the Policy Statement on Comparative Broadcast Hearings*, GC Docket No. 92-52, 7 FCC Rcd 2664 (1992); *Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5475 (1993); *Second Further Notice of Proposed Rulemaking*, GC Docket No. 92-52, 9 FCC Rcd 2821 (1994); *Notice of Proposed Rulemaking, Competitive Bidding for Commercial Broadcast and ITFS Service Licenses*, MM Docket No. 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, 12 FCC Rcd 22,363 (1997); *First Report and Order*, MM Docket No. 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, 13 FCC Rcd 15,920 (August 18, 1998), *recon. denied Memorandum Opinion and Order*, 14 FCC Rcd 8724 (1999); *modified Memorandum Opinion and Order*, 14 FCC Rcd 12,541 (1999).

6689 (1994), *further modified*, 10 FCC Rcd 12182 (1995) (non-reserved channels).

6. Subsequently, Congress enacted the Balanced Budget Act of 1997 requiring the use of auctions to select among mutually exclusive applicants for commercial broadcast station licenses. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, 11 Stat. 251 (1997) (*Balanced Budget Act*). We recently implemented commercial auction procedures. *Report and Order, Competitive Bidding for Commercial Broadcast and ITFS Service Licensees*, MM Docket No. 97-234, FCC 99-74, 14 FCC Rcd 8724 (1999). (*Competitive Bidding*). However, the Balanced Budget Act does not extend mandatory auction authority to construction permits for "noncommercial educational broadcast stations" and "public broadcast stations," as defined by Section 397(6) of the Communications Act. *See* 47 U.S.C. §§ 309(j)(2)(C), and 397(6). With respect to such stations, the Commission has continuing authority to use other selection methods, such as lotteries and traditional comparative hearings.[2] *See, e.g. Balanced Budget Act*, § 3002(a), *codified as* 47 U.S.C. § 309(i)(5)(B). In this proceeding, the Commission issued a Further Notice of Proposed Rule Making asking whether a lottery, point system, or modified comparative hearing was the best selection procedure on channels reserved for NCE use. *Further Notice of Proposed Rulemaking, Comparative Standards for Noncommercial Educational Applicants*, MM Docket No. 95-31, 13 FCC Rcd 21167 (1998) ("*Further Notice*"). In view of the mandatory use of auctions for commercial stations, coupled with the exemption of NCE

[2] *But see* Section III(H) *infra* concerning NCE applicants on non-reserved "commercial" channels.

stations from auction, the Commission also sought comment on whether, and under what procedures, noncommercial entities may continue to compete with commercial applicants for non-reserved spectrum. In response to the *Further Notice*, we received approximately 60 comments, many of which were filed jointly with others, representing the views of well over 100 organizations. *See* Appendix B.

III. DISCUSSION

A. Selection Methods on Reserved NCE Spectrum

7. The *Further Notice* sought comment on three possible ways to select among applicants competing for NCE reserved channels: (1) a simplified traditional hearing; (2) a weighted lottery; and (3) a point system. There is some support in the comments for each of the three options presented, as well as a new suggestion that permits be awarded to the first applicant to file. However, the vast majority of commenters favor use of a point system in which applicants would be awarded points for different aspects of their proposals and the applicant with the highest score would win. As discussed below, each method has some merit, but we agree with the majority of the commenters that a point system is best.

1. Traditional Comparative Hearings

8. Several commenters believe that traditional hearings are necessary to select the very best applicant. Educational Information Corporation, for example, says that because hearings involve live interaction between the applicants and an Administrative Law Judge (ALJ), hearings result in reasoned decisions based on fine details, impossible to consider in other more mathematical or

random selection procedures. The Center for Media Education maintains that an ALJ can differentiate between candidates who both have a certain characteristic, but who manifest that characteristic to different degrees. Pinebrook Foundation notes that the presence of an ALJ is very effective in exposing sham applications.

9. The vast majority of commenters, however, believe that the benefits of traditional hearings are outweighed by their disadvantages. Community Television, Inc. states that the subjective nature of hearings makes it difficult for applicants to evaluate their chances of prevailing, resulting in lengthy proceedings, where the costs are prohibitive for many noncommercial educational organizations. Cornerstone Community Radio says that the traditional NCE hearing is more like a "war of attrition" than a process for selecting the best applicant. Several NCE licensees who have participated in the traditional hearing process maintain that cases were more often resolved by settlement among the parties than by ALJ decision.[3] Commenters, such as Mohave Community College, recognize that hearings can be much more thorough than other selection methods, but believe that there is a greater public interest in expediting new service to the public and in minimizing burdens on applicants and the Commission.

10. Upon considering the comments, we conclude that the primary benefits of traditional hearings (*e.g.*, the ability to make fine distinctions between candidates and the ability to expose potential abuse by questioning applicants in front of a judge) are not substantial enough

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[3] *Comments of Station Resource Group* at 8; *Comments of Alaska Public Telecommunications, Inc., et al.* at 4.

to justify maintaining that cumbersome approach. Lengthy traditional hearings are costly to noncommercial applicants (who often are less able to afford these costs than commercial applicants), require expenditure of substantial Commission resources, and significantly delay the implementation of noncommercial educational service to the public. The primary benefits of hearings can be accomplished to a large extent in shorter qualitative comparisons, coupled with safeguards to address any potential for abuse. Eliminating traditional hearings for NCE applicants would be consistent with our efforts to simplify and streamline our broadcast regulations overall, and with our elimination of commercial comparative hearings.[4] *See First Report and Order, Streamlining of Radio Technical Rules*, MM Docket No. 98-93, FCC 99-55, 14 FCC Rcd 5272 (1999); *Report and Order, Streamlining of Mass Media Applications, Rules and Processes*, MM Docket Nos. 98-43, 94-149, 13 FCC Rcd 23,056 (1998); *Competitive Bidding*, 13 FCC Rcd 15920 (1998). Accordingly, we reject proposals that ask us to retain the traditional hearing process.

2. Lotteries or First to File Approach

11. In response to the desire for a simpler, fairer, and less costly approach, several commenters support the use of lotteries, such as those once used in the Low Power Television

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[4] For commercial applications filed after July 1, 1997, the elimination of hearings was mandated by statute, but for applications filed prior to that date, the elimination of hearings was within the Commission's discretion.

Service.[5] In response to our concern that applicants selected through a random process may not be the most likely to provide the highest level of public service, a few commenters state that, because NCE stations must satisfy the needs of listeners and underwriters to survive financially, they are as likely to provide a high level of service as applicants chosen through other processes.[6]

12. American Family Association also supports a simplified process, but believes that a "first in line" approach is preferable to a lottery. American Family would award a permit to the first qualified applicant to file. It views this as a way to encourage "pioneer" applicants who undertake the engineering work to identify an available NCE radio channel, and to discourage "copycat" applications that simply photocopy portions of the initial applications. American Family maintains that a first to file approach would be easily understood by the public, require no subjective decisions by the Commission, and be fair to every applicant.

13. The lottery and first to file suggestions are both opposed by other commenters. There is particularly strong opposition to lotteries from a broad range of NCE applicants who collectively voice three major concerns: (1) speculation; (2) failure to select the best applicant; and (3) the potential for judicial challenge and delay. With respect to speculation, commenters such as CSN International maintain that a lottery process would encourage an

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[5] *See, e.g.*, Comments of Educational Media Foundation. Competing LPTV applications are now resolved by auctions instead of lotteries pursuant to our *Comparative Bidding* decision. *See* note 1, *supra*.

[6] *See, e.g.*, Comments of Pensacola Christian College at 14-15.

applicant to file more applications than necessary, just to "beat the odds." A few commenters conducted a study of our frozen proceedings, and believe that speculation has already begun based on the theory that we might have a lottery.[7] With respect to selection of the best applicant, commenters observe that the random nature of lotteries makes it entirely possible that the least qualified applicant could win. They maintain that even if a lottery is weighted to favor applicants with certain desirable qualifications, such weighting only gives an applicant additional chances, and that the outcome of a lottery remains random.[8] Finally, commenters are concerned that, as noted in the *Further Notice*, there are two lottery weightings, for broadcast diversity and minority ownership, that are mandated by statute, and which the Commission cannot change. *See* 47 U.S.C. § 309(i)(3). The commenters believe that these mandatory preferences may be difficult to apply to noncommercial broadcasters and/or unconstitutional in light of a United States Supreme Court holding that racial preferences are subject to strict scrutiny.[9]

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[7] Alaska Public Telecommunications, Inc., for example, states that it has analyzed information about competing NCE applications on the Commission's internet web site, and that over 400 of our current applications involve 15 to 20 NCE applicants who have overfiled against each other in virtually every state.

[8] *See, e.g. Reply Comments of Educational Information Corp.* at 6 ("We are very concerned and quite worried that the Commission is seriously considering a 'ping-pong ball, bingo machine' lottery approach. . . . The Commission should consider that even if the preponderance of evidence clearly shows that one applicant is better qualified in a particular comparative situation, the lottery method could still select . . . the least qualified of the lot.")

[9] *Adarand Constructors v. Pena*, 515 U.S. 200 (1995). *See also Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344; *petition for*

(Continued on following page)

14. There is likewise little support for using a first to file approach as a stand alone selection method, although some commenters find it less objectionable as a component of a point system. Opponents to the first to file approach say that its only benefit is processing expedience. They believe that it would shift our applicants' focus from the quality of applications to the speed with which they can file.[10]

15. If our only goals were to select among competing NCE applicants easily and quickly, lotteries or first to file procedures would be excellent choices. Speed and efficiency are, however, only a part of what we seek to achieve. Public broadcasting holds a special place in meeting the informational, cultural, and educational needs of the nation. Neither a lottery nor a first to file approach is the optimal way to select applicants who will provide "diversity and excellence" in educational broadcasting to the public. *See* 47 U.S.C. § 396(a)(5). The statutory requirement that broadcast lotteries be weighted would increase the probability of selecting such an applicant, but, as noted by the commenters, would provide no assurance of such an outcome. It is also apparent from the comments that the statutory weightings will almost certainly become the subject of lengthy constitutional litigation, which would jeopardize the major benefit of lotteries: speed.[11] Accordingly, we reject these approaches.

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rehearing denied, 154 F.3d 487; *petition for rehearing en banc denied*, 154 F.3d 494 (D.C. Cir.1998).

[10] *Reply Comments of Center for Media Education, et al.* at 16; *Reply Comments of Mohave Community College* at 5-6.

[11] One commenter argues that we could hold a straight lottery without statutory weightings because the simplicity of a lottery would

(Continued on following page)

3. Point Systems

16. There is broad support in the comments for use of a point system selection process. Under such a system, the Commission assigns points to various characteristics, evaluates applications for those characteristics, and awards a permit to the applicant with the highest score. Such a system has been used in the Instructional Television Fixed Service (ITFS), which also has educational goals. Commenters say that, in comparison to traditional hearings, a point system is an objective, inexpensive, and streamlined process.[12] Commenters also believe that a point system would make best use of scarce spectrum because the prevailing applicant would be the one proposing the most meritorious use, as defined by the points.

17. Commenters opposing a point system are generally those who strongly prefer one of the other options discussed above, and their reasons for disfavoring a point system generally correspond to their perception that another choice is superior. American Family Association, for example, a proponent of the simplicity of a first to file option, maintains that a point system, though simpler than a traditional hearing, is still too burdensome and

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in itself increase the applicant pool, and foster the statutory goals of diversity and minority ownership. *See Comments of Pensacola Christian College* at 9. In view of the specific language of the statute and its legislative history, as discussed in the *Further Notice*, we cannot accept this view that an unweighted lottery is legally permissible. *See Communications Amendment Act of 1982*, S. Rep. No. 97-101, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 2237, 2291-92; *Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349 (D.C. Cir. 1988).

[12] *Comments of National Public Radio, et al.* at 6; *Comments of Roaring Fork Public Radio Translator, Inc., et al.* at 2.

time consuming because the Commission would continue to evaluate each application on the merits. Similarly, Educational Information Corporation, which strongly favors the thorough scrutiny that is possible in traditional hearings, believes that applicants can too easily manipulate a point system to obtain credits for which they do not truly qualify. Pensacola Christian College is concerned that a point system will discourage meaningful differences between applicants, because applicants will become homogeneous to conform to the ideals of the point system.

18. Nonetheless, after carefully weighing the pros and cons of all options, we have, as indicated, decided to use a point system to select among NCE applicants on reserved channels. We believe that an appropriately crafted point system can achieve a wide range of our goals for NCE broadcasting simultaneously. Through a point system, we can eliminate the vagueness and unpredictability of the current system, clearly express the public interest factors that the Commission finds important in NCE broadcasters, and select the applicant who best exemplifies these criteria. A point system would reduce the costs and time associated with comparative proceedings both for applicants and the Commission. NCE applicants, who often have limited financial resources, would not incur the large travel and legal expenses associated with preparing a case for hearing, giving live testimony, and cross-examining the testimony of others in traditional hearings. The Commission could render decisions relatively quickly by replacing lengthy narratives with simpler point tallies. Further, applicants that do not meet at least some of the criteria will be less likely to apply than in a random selection method in which they might win through luck alone. We recognize, as mentioned in the comments, that applicants

may adopt various factors included in the point system, rather than those elements appearing spontaneously. If our point system provides an impetus for future NCE applicants to manifest characteristics that are genuine and in the public interest, we would view this as a positive result, regardless of any spontaneity. Of course, we would be concerned if these characteristics were merely feigned, and thus will select factors that are not easily subject to gamesmanship. We discuss below the factors we will include in our point system.

B. Elements In An NCE Point System

19. In the *Further Notice* we proposed to award points to applicants who: (1) would offer a first or second NCE service to the community; (2) who had no other nearby stations; and (3) would serve at least ten percent more area and people than a competing proposal. The *Further Notice* also indicated our willingness to consider other factors. We specifically asked whether commenters would support credits for applicants: (1) controlled by minorities; (2) that have an established educational presence in the community; (3) that are part of an existing educational plan of a state or municipality; and/or (4) whose leadership would be significantly more representative of the community than other applicants. Although the commenters overwhelmingly support a point system, there is no corresponding level of agreement on the individual elements that would make up such a system, the number of points to be awarded to each element, or what to do in the event of a tie. However, the commenters' critique of the elements in our proposed system, together with their proposed modifications, form a good basis for our construction of a point system that will best serve the public interest. A

summary of the point system that we have selected appears as Appendix A to this decision. In brief, we will consider fair distribution of stations to communities as a threshold issue and, if a decision is not reached on the basis of that factor, we will consider which applicant merits points for localism, technical superiority in terms of area and population served, and either diversity of ownership or service to accredited schools through a state-wide network.

1. Fair Distribution of Service as a Threshold Issue (Reserved Band Radio only).

20. In the *Further Notice* we proposed that, for mutually exclusive NCE FM radio applicants proposing to serve different communities on reserved channels, we would award points to the applicant that would serve a community receiving no other or limited other NCE service. We did not propose to consider this factor at the application stage for NCE television stations on reserved channels because reserved television channels are allotted to specific communities by table based on consideration of fair distribution standards. As a result, all mutually exclusive television applications necessarily propose service to the same community. Our analysis of NCE fair distribution also does not apply to AM channels because no AM channels are reserved for NCE use.

21. The *Further Notice* proposed to award a credit of two points for radio applicants offering first local NCE radio service received in a community. We proposed that radio applicants offering the second NCE service received or the first local service licensed to a particular community would receive one point. We noted that this proposal was

based on Section 307(b) of the Communications Act, which states that the Commission must "provide a fair, efficient, and equitable distribution" of broadcast service among the states and communities. 47 U.S.C. § 307(b). The 307(b) factors proposed in the *Further Notice* are closer to those which have been used in commercial proceedings, than in NCE proceedings. The NCE 307(b) analysis, developed in *New York University*, 10 RR 2d 215 (1967) looked at "the number of other reserved channel educational FM services available in the proposed service area of each applicant and the areas and populations served thereby." The first service/second service type of analysis proposed, while derived from commercial broadcasting, is more readily adapted to an NCE point system, and more consistent with our ongoing goal to evaluate applications quickly, with minimal burden on applicants and on the staff.

22. The commenters generally recognize that fair distribution of service is an important concept and that it is appropriate to consider when there are competing NCE radio applications proposing to serve different areas. *See Seattle Public Schools*, 4 FCC Rcd 625 (1989). For example, Colorado Christian University maintains that consideration of this factor is vital to provide educational broadcasting to unserved and underserved communities. Sacred Heart University urges the Commission to consider fair distribution of service issues first, as a threshold issue, as it has done in the past, before applying a point system.[13] Many of the commenters who support a credit for a first or second service to underserved areas believe that no corresponding credit should be awarded for first local

[13] *Reply Comments of Sacred Heart University, et al* at 3.

NCE station *licensed to* a particular community. These commenters are concerned about the potential for abuse by applicants identifying small communities, when they propose facilities nearly identical to an applicant proposing to serve a large community and in fact intend themselves to serve that large community. Some comments, which were filed before we proposed in a separate proceeding to establish community coverage requirements for NCE facilities, argue that community of license is less meaningful in the NCE service because licensees are not required to cover their community of license with a specified signal strength.[14]

23. Several commenters, while supporting inclusion of a Section 307(b) component in the NCE selection system, believe that Section 307(b) factors will rarely be decisive. According to these commenters, about 91% of the country's population already receives at least one NCE radio signal.[15] There is also concern that the population receiving a first or second service be of a sufficient size to be meaningful. Commenters thus ask the Commission to define what constitutes a significant population receiving first or second service, and WAY-FM, Inc. suggests that the Commission establish one source or computer program, so that calculations can be consistent. To avoid abuse, Station Resource Group states that licenses awarded to applicants

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[14] Since these comments were filed, we have proposed coverage requirements for NCE stations. *See Notice of Proposed Rulemaking*, MM Docket No. 98-93, *Streamlining of Radio Technical Rules*, 13 FCC Rcd 14,649, 14,876 (1998) ("*Technical Streamlining*").

[15] *See Comments of NPR, et al.* at 37, n. 86; *Comments of Station Resource Group.*

on the basis of Section 307(b) superiority should be conditioned on the applicant constructing substantially as authorized.

24. Upon consideration of the comments, we conclude that fair distribution of service should remain a threshold issue, rather than one of several factors considered together with others in a point system. This approach would be most consistent with our existing Section 307(b) approach, which has been upheld in court and recently followed in establishing auction procedures for commercial AM radio stations. *See FCC v. Allentown Broadcasting Corp*, 349 U.S. 358 (1955); *Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046 (D.C. Cir. 1977); *Competitive Bidding*, 13 FCC Rcd 15920, 16010 (1998). We recognize that there may not be a large number of cases in which Section 307(b) issues will be dispositive. Nevertheless, in those cases where there are substantial Section 307(b) differences, such matters will be addressed first. In examining fair distribution issues, we will use the general process set forth in the Section of our *Competitive Bidding* proceeding that addressed Section 307(b) considerations for AM stations. *See Competitive Bidding* 13 FCC Rcd 15920 (1998). Generally, a proposal to provide the first NCE service received by a comparatively large population will be preferred over another providing the first NCE service received by a significantly smaller population, or the second NCE service to any sized population. Similarly, a proposal that does not provide any significant first NCE service but which provides a second NCE service to a comparatively large population will be preferred over another such proposal providing second NCE service to a significantly smaller population. This threshold 307(b) analysis will not be undertaken at the application stage

for NCE applications filed for channels identified in the television and radio Table of Allotments as reserved specifically for NCE use, as the 307(b) analysis has been previously conducted in the rulemaking component of the process when the designated community and channel were added to the table of allotments.

25. We agree with commenters that differences between proposals should be decisional only if they are significant. Mohave Community College, for example, suggests that we consider the provision of a first or a second NCE service insignificant unless the new service would reach at least 2,000 people or at least 5% of the people within the proposed coverage area. We generally concur with this suggestion, and with the 2,000 person minimum, but believe that the percentage difference in population coverage must be greater if it is to distinguish between applicants in well populated areas, as a threshold matter. Thus, for purposes of determining whether fair distribution of service dictates grant of one NCE radio application over another in a Section 307(b) context, we will first consider whether applicants who are proposing to serve different communities will provide the first or second NCE aural signal to at least 10% of the persons within the 60 dBu (1mV/m) service contours of their proposed NCE FM stations. For example, if census data indicates that 25,000 people live within a proposed NCE-FM station's service contour, the station would have to offer first or second NCE aural service to at least 2,500 people (10% of 25,000) to obtain a decisional preference. It is possible that more than one applicant might offer the same level (first or second) of NCE aural service to 10% or more of its coverage area. In such cases we will proceed to a second step, comparing the number of people receiving such new

service from each station. We will grant the permit to the applicant which will provide the highest level (first or second) NCE aural service to at least 5,000 more people than the other applicants.[16] Differences between competing proposals that amount to less than 5,000 people would be considered insignificant, and we would then compare the proposals under a point system. Thus, in our example of a service area covering 25,000 people, the applicant who would provide first or second NCE aural service to 2,500 people would be considered equivalent to a competing applicant that would provide that same level of new service to up to 7,499 people (2,500 people plus fewer than 5,000 additional people) and a point system rather than a dispositive threshold preference would be used to compare these applicants. If, however, the second applicant serving a different community would offer the same level of new service to 7,500 or more people, the applicant providing new service to the larger population would prevail as a threshold matter, because its proposal would be superior by at least 5,000 people.

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[16] This 5,000 population figure is larger than the *de minimis* standard used in allotment rule makings. *See Seabrook, Texas*, 10 FCC Rcd 9360 (1995). The higher number adopted here accounts for two differences between allotment proceedings and applications proceedings. First, allotment proceedings generally examine Section 307(b) issues in vastly underserved "white" and "gray" areas, so a difference in population of 1,000 people may be significant. When considering competing NCE applications, however, we will be focussing on the availability of NCE service, where presumably there will be other (commercial) service provided already. Second, in an allotment process, the party that "wins" gets a smaller advantage. When an allotment proposal succeeds, the result is merely the allotment of a station to a particular community, rather than the selection of a permittee. In contrast, the applicant prevailing in an application proceeding will receive a construction permit to the exclusion of other applicants.

26. As commenters rightfully stress, a consistent method must be used to count population. Based on our experience in examining population data supplied to us by various applicants, we conclude that population in NCE applications should be derived from figures provided by the United States Bureau of the Census. Applicants would determine population by counting persons within each of the relevant census blocks, the smallest unit of population measure of the Census Bureau.[17] Consulting engineers now commonly use this method to complete various types of broadcast application exhibits and its use here should produce consistent, reliable, and independently verifiable population data.

27. We also agree with commenters that a selection of one NCE applicant over another based on Section 307(b) considerations would not be meaningful were we to allow the prevailing applicant to amend its proposal and construct a facility with fewer or none of the benefits proposed. Therefore, we will adopt the suggestion that permits and licenses awarded to applicants based on Section 307(b) considerations be conditioned on construction and operation substantially as proposed. Furthermore, we will prohibit an NCE radio applicant receiving a decisive 307(b) preference from downgrading service to the area on which the 307(b) preferences was based for a period of four years, the length of the holding period that we adopt *infra*. We note that, generally, under existing

[17] The inclusion of a particular census block will be based on the block's unique centroid coordinates. Applicants must use the most recent census block data made available by the Census Bureau. The Bureau of Census currently releases census block data following each decennial census but does not provide revised mid-decade census block population data.

commercial radio policy a mutually exclusive applicant that receives an allotment as a result of a decisive Section 307(b) preference is not permitted to downgrade prior to one year of operation. *Report and Order, Lower Classification of an FM Allotment*, 4 FCC Rcd 2413, 2414 (1989). The longer (four year) period that we are adopting in the NCE context recognizes the greater benefit that this Section 307(b) preference provides to NCE applicants. An NCE applicant who prevails on Section 307(b) grounds at the application stage receives a construction permit, a definitive selection over other applicants, whereas commercial FM applicants who receive a Section 307(b) preference at the allotment stage must then file an application for a construction permit, which is subject to competition from others who also apply to be licensed on the allotted channel.

2. Points for Evaluating Applicants

28. For proceedings not resolved by our fair distribution analysis, we will apply the following point system to the competing applications. *See* paras. 114 and 115 *infra* (discussing allocation of nonreserved channels as reserved).

a. Diversity of Ownership (2 points)

29. The first element in the point system will be diversity of ownership. In the *Further Notice* we proposed to award two points for "local diversity," *i.e.*, we proposed to award two points to the applicant if the principal community contour of the proposed NCE station does not overlap the principal community contour of any commonly controlled broadcast station. We stated that this proposal would

foster our goal of broadcast diversity by enabling the local public to be served by differing NCE licensees. *Further Notice* at ¶ 21. We expressed concern, however, that favoring diversity might disadvantage state-wide educational networks, which often attempt to serve an entire state, and may have a state mandate to do so.[18] In an effort to achieve that goal, the contours of a state network's stations may overlap, which could disadvantage it under a point system favoring local diversity.

30. Most commenters favor some type of diversity credit, believing that diversity of ownership serves the public interest by promoting differences in programming and viewpoints.[19] The commenters disagree, however, over whether the credit should be for local diversity or national diversity. Commenters favoring consideration of only local diversity, such as St. Gabriel Communications, say that when one applicant already has a station serving an area, the public interest is best served by adding a new media voice. Colorado Christian University notes that without a credit for local diversity it would be easy for one entity to dominate in an individual community. Other commenters, however, believe that a credit for local diversity might harm existing local educational stations. National Public Radio and various individual NCE licensees state that a credit for local diversity would favor non-local applicants with hundreds of stations across the country over a local applicant with only one existing station. NPR states that local stations may seek to acquire a second station for various reasons, including a desire to improve service to

[18] *See Further Notice* at para. 14 (raised in the context of lotteries).

[19] *See, e.g., Comments of WAY-FM, Inc., et al.* at 4-5.

outlying areas that receive the station's signal only marginally or a desire to develop dual program services in the same area. For example, it says that a university operating one station with a music format may apply for another station, and program it with news and information. Some commenters favor awarding separate points to state-wide networks, which presumably would balance any disadvantage such networks might experience if they were unable to receive a local diversity credit due to overlapping contours of stations within the network.[20]

31. Commenters opposed to local diversity as an element of a point system also are concerned that this factor might be subject to abuse. Station Resource Group believes that an experienced broadcaster with a good consulting engineer could "massage" the contour of the proposed station to avoid overlap with its existing station, and then modify the new station's contour later. Commenters state that relying on overlap of principal community contours is less than optimal in the NCE service because NCE stations are not currently required to place a principal community contour over their community of license.

32. Some commenters believe that the Commission's goals can better be achieved through a credit for *national* diversity. These commenters, such as National Public Radio, believe that small educators are being "squeezed out" by large groups wanting to establish national chains of NCE stations and propose that we apply a sliding scale of points to applicants, depending on the number of stations they control nationally.

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[20] *See* para. 56 *infra*.

The points suggested vary from commenter to commenter. Alaska Public Telecommunications, for example, suggests 2 points for applicants with five or fewer stations in the same broadcast service (FM or TV); 1 point for applicants with 10 or fewer stations, a 2 point demerit for applicants with over 25 stations, and a 3 point demerit for applicants with over 50 same service stations nationwide. In response, Community Television maintains that applicants should not be penalized for their interests in other markets, such as by the demerit system discussed above, because this approach would attract novices to NCE broadcasting and drive out veteran broadcasters.

33. We have decided to include local diversity, but not national diversity, in the NCE point system. We have long considered diversity of local ownership a critical consideration because it enables the public to receive information reflecting a variety of viewpoints from different sources. In commercial broadcasting, even under the relaxed ownership provisions of the Telecommunications Act of 1996, local ownership of radio stations is restricted to a maximum of eight stations, no more than five of which can be in the same service (AM or FM), in the largest markets of 45 or more stations. Under recently adopted rules, local television ownership is still restricted to one or two stations, depending on the circumstances.[21] In contrast, the role of national diversity in our commercial ownership rules has recently been reduced. There are no national radio ownership limits, the national television ownership limit has been eliminated, and the national television audience reach cap has been raised from 25% to

[21] *See Report and Order, Broadcast Television National Ownership Rules*, MM Docket Nos. 91-221 and 87-8, FCC 99-209 (Aug. 6, 1999).

35%.[22] We are not persuaded that national ownership plays such a significant role in NCE broadcasting that, contrary to the general trend in broadcasting, it should become a pivotal factor in licensing new stations.

34. Contrary to some commenters' views, we do not believe that a credit for local diversity would unduly limit the ability of the public to hear the viewpoint of existing NCE stations. With respect to the local NCE broadcaster who wants to offer better service to areas it now serves marginally, the broadcaster could achieve this result with a translator station, without constructing a second full service station.[23] With respect to the example of a college wanting to program multiple stations in different formats, the fewer existing stations licensed to that college, the easier it would be for it to plan its coverage to avoid any contour overlap, and therefore to qualify for the diversity credit. The college might be disadvantaged, as National Public Radio suggests, only if its multiple stations would cover the same area. In such circumstances we in fact do not think it is inappropriate to favor another applicant with no local outlet rather than permitting the local campus to express what may be the same editorial viewpoint through two separate outlets. We do recognize that different equities might apply to a larger university

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[22] *Order, National Television Ownership and Dual Network Operations*, 11 FCC Rcd 12374 (1996); 47 C.F.R. § 73.3555 (e). *See also Broadcast Television National Ownership Rules*, MM Docket Nos. 96-222, 91-221, and 87-8, FCC 99-209 (Aug. 6, 1999).

[23] NCE radio licensees are able to operate translators more readily than their commercial counterparts because the restriction prohibiting a commercial station from operating a translator that extends the primary station's service area does not apply to NCE licensees. 47 C.F.R. § 74.1232.

system providing educational services on multiple campuses throughout a state, for which it would be harder to avoid contour overlap. However, such applicants will not be disadvantaged because, if they did not qualify for the local diversity credit, they could likely qualify for an equal credit as a state-wide network, as discussed in paragraphs 56 to 61 *infra*. As for the concern that small local educators could be "squeezed out" by large national chains of NCE stations, we consider this a valid concern, and will address it by including a localism factor in our point system, and by considering the extent of an applicant's national broadcast interests as a secondary factor, used as a tie breaker.

35. We believe that principal community (city grade) contour is the most appropriate benchmark for examining local diversity.[24] Most of a station's listeners generally are located within this contour. Accordingly, to foster diversity for most of a proposed NCE station's listeners, we will award two points to an applicant if the principal community (city grade) contour of the proposed station does not overlap the principal community (city grade) contour of any attributable NCE or commercial station (comparing radio to radio and television to television).[25] We discuss attribution in the NCE context in paragraphs 75-79 *infra*.

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[24] Unlike commercial stations, NCE FM stations are not required to provide a minimum field strength signal over their community. 47 C.F.R. § 73.315(a), Note a. We have, however, in a separate proceeding, proposed to begin requiring them to provide 60 dBu (1 mV/m) service to at least a portion of their community of license. *Technical Streamlining*, 13 FCC Rcd at 14,876 (1998).

[25] The principal community (city grade) contours are the 5 mV/m for AM stations under Section 73.24(i), the 3.16 mV/m for FM stations calculated in accordance with Section 73.313(c).

36. We specifically note that the principal community contour that we are using for purposes of determining this diversity credit, is smaller than the contours that we will use for purposes of determining whether a radio applicant should prevail based on fair distribution or whether a radio or television applicant should receive any points for its technical proposal. We have decided for purposes of considering diversity points, not to use larger contours (such as the 1 mV/m contour for FM radio and the Grade A or B contours for television), which are used for applying other points. Use of larger contours could preclude existing licensees from receiving diversity points, even if their existing stations are relatively distant from the proposed new station and would thus share few potential listeners. This is especially so for television stations, where the Grade A and Grade B contours can cover very large areas. Use of the principal community (city grade) contour focuses our diversity consideration on the area where the majority of a station's listeners are located.[26] We also note that, for radio, use of the principal community (city grade) contour follows existing policy, in which the Commission examines a somewhat smaller area for purposes of applying our commercial radio multiple ownership rules than for examining service area for our technical rules and fair distribution.

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[26] For example, we have in a separate proceeding noted that a study by NBC shows that at least 72.4 percent of AM audiences are within the AM's station's principal community contour and that at least 63.8 of FM audiences are located with the FM station's principal community contour. *First Report and Order, Broadcast Multiple Ownership Rules*, MM Docket No. 87-7, 4 FCC Rcd 1723 (1989).

b. Technical Parameters (generally 1 point)

37. We proposed in the *Further Notice* to favor applicants who serve significantly larger areas and populations. Specifically, we proposed to award a point if there is a 10 percent or greater difference in the area and population to be served in one proposal than in a competing proposal. We proposed that, generally, this would be a one point credit, except that in certain rare instances an applicant with a far superior proposal could get two points. We proposed that applicants demonstrate both larger population *and* area because both are meritorious factors, and because it would otherwise be difficult, in the streamlined point system, to distinguish between mutually exclusive applications, one of which would serve a populous urban area with many existing radio stations, and the other of which would offer service to a wide area with fewer people and fewer existing service options.

38. Several commenters supported this proposal without revision.[27] Several others believe that clarifications would be needed to make this factor work, so that different engineers will derive consistent results. Mohave Community College suggests that the Commission should make the calculation of area and population itself or should require competing applicants to submit a joint engineering report calculating area and population in a manner agreed to by all parties. A few commenters oppose any credit for technical factors. Americans for Radio Diversity states that small community-focused stations sometimes better serve the public than stations reaching larger areas and

[27] *E.g. Comments of Faith Broadcasting* at 7; *Comments of NPR, et al.* at 23.

populations. Community Television, Inc. is concerned that applicants may propose more than they are willing to build and then downgrade after receiving the credit.

39. We will adopt, with clarification and safeguards, a credit for technical parameters. We believe that for full power noncommercial educational stations, the public interest is best met when applicants maximize their facilities to reach the widest area *and* population. Thus we will give a one point credit to the applicant that covers the largest area and population, provided that this applicant covers at least 10% greater area *and* 10% greater population than the next best technical proposal. In rare instances in which the top applicant covers a 25% greater area *and* population than the next best proposal, we will award two points.[28] We are not suggesting that a small station that does not qualify for this credit cannot also provide excellent programming, only that fewer people and areas benefit from that programming.

40. Of course, as commenters observe, this credit would not be meaningful if applicants could subsequently modify their facilities to cover smaller areas and populations. As with stations prevailing on Section 307(b) factors, we will condition new NCE authorizations that receive credit for technical parameters on construction of the facility substantially as authorized. If a modification is necessary, the applicant will be required to serve an equivalent area and

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[28] The *Further Notice*, proposed a slightly different system of awarding these points based on whether a first application is 10% greater than a second application, which is in turn 10% greater than a third application. We believe that the method proposed, which compares only the best and second best technical proposals, is simpler for both the applicant and the Commission.

population, unless the applicant makes a compelling showing that the modification would be in the public interest.[29] We also agree with commenters that all applicants must use the same standards so that they can be meaningfully compared. As established above, population should be based on the most recent census block data made available by the Census Bureau. *See* paragraph 26 *supra*. Area will be measured by the number of square kilometers within the 60 dBu service contour of FM stations and the Grade B contour of television stations. These contours will be calculated using the standard predicted contours established in our rules. 47 C.F.R. §§ 73.313(c) (FM) and 73.683 (TV).

c. Localism – Established Local Applicant (3 points)

41. Among other factors on which we sought comment was a "local educational presence," giving certain established local organizations a credit over new or distant organizations. We based this proposal on spectrum efficiency, stating that it was more efficient to award a permit to a local applicant whose educational goals are limited to a specific geographic region, than to a non-local applicant who could apply in other locations where the spectrum was more readily available. For example, we anticipated that a college might be able to show that it could only use a station in the immediate vicinity of its campus. We specifically distinguished the local educational presence

[29] We expressed similar concern about commercial stations proposing to downgrade after being awarded a permit in a comparative allocation proceeding based on technical superiority. *Report and Order, Lower Classification of an FM Allotment*, 4 FCC Rcd 2413, 2414 (1989).

proposal from other localism indicia that might be based on assumptions of superiority of a local applicant's qualifications or its programming. We noted that we were concerned about whether such assumptions might raise issues under *Bechtel v. FCC*, which overturned as unsupported a core credit formerly used in commercial proceedings. Specifically, it overturned our "integration" credit, which awarded an applicant a significant comparative advantage if the applicant proposed to be an owner-manager, working at the station for which the applicant sought our authorization. Many commenters, however, express strong support for localism, urging us to adopt a greater point credit than originally proposed, and arguing that such a credit would not be inconsistent with the *Bechtel* case.

42. Given the strong support for localism in the comments, we have reviewed the concerns expressed by the court in *Bechtel*. A primary concern underlying the court's decision invalidating the central comparative criterion used to select commercial broadcast licensees was that there was no obligation for a successful applicant to adhere to its integration proposal, and no evidence indicating the extent to which the applicants had kept such promises voluntarily in the past. In addition to this lack of permanence, the claimed public interest advantages of integration were, in the court's view, based on a mere "predictive judgment" not substantiated by adequate evidence. Finally, the court was concerned that the Commission's selection criteria for commercial applicants emphasized integration, and in particular quantitative integration, to the exclusion of other factors – such as spectrum efficiency, broadcast experience, and local

residence – that could conceivably affect a station's performance.[30] By way of example, the court observed that, although licensee awareness of and responsiveness to community needs was integration's stated goal, "[a]n applicant whose owner-manager knows nothing about . . . the community but promises to work a 40-hour week" would prevail over a life-long resident of the community not proposing to work full-time. 10 F.3d at 882.

43. After careful review, we agree with commenters that, bearing in mind the concerns articulated in *Bechtel*, it is appropriate to adopt a localism credit in the unique circumstances presented by competing applications for a permit to construct a noncommercial educational broadcast station. The *Bechtel* court, although invalidating our integration criterion generally, nevertheless recognized that an applicant who is familiar with the community is likely to be aware of its special needs. *Bechtel*, 10 F.3d at 885.[31] In the context of noncommercial educational broadcasting, the Commission has long recognized the unique role played by localism, and its public interest significance is amply documented.

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[30] Quantitative integration measured the ownership percentages of those owners proposing to have a managerial position at the station and varied depending on whether the owner(s) would work full-time or part-time. Quantitative credit, in turn, affected the weight given to various qualitative "enhancement" factors, including local residence of integrated owners.

[31] "Familiarity with a community seems much more likely than station visitors or correspondence to make one aware of community needs." 10 F.3d at 885. *See also Orion Communications, Ltd.*, 131 F.3d 176, 179-80 (D.C. Cir. 1997), suggesting the continuing relevance of local familiarity after *Bechtel*, at least in terms of selecting an interim operator who would best serve the public's interest in responsive programming.

44. The history and mission of NCE broadcasting recognize the importance of localism, and localism has indeed been a linchpin to successful NCE services. As the Center for Media Education demonstrates, the 1967 report of the Carnegie Commission on Educational Television shows that localism was a principle on which the NCE service was built. The Carnegie Report, on which Congress relied to develop and improve noncommercial educational television stations, reflects the ongoing vision of local communities as the heart of educational broadcasting:

> Educational television is to be constructed on the firm foundation of strong and energetic local stations. The heart of the system is to be in the community . . . [T]he overwhelming proportion of programs will be produced in the stations . . . local skills and crafts will be utilized and tapped. . . . Like a good metropolitan newspaper, the local station will reflect the entire nation and the world, while maintaining a firm grasp on the nature and needs of the people it serves.

Reply Comments of Center for Media Education citing Carnegie Commission on Educational Television, *Public Television: A Program for Action*, 87 (1967).

45. The Communications Act itself also recognizes the importance of localism in educational broadcasting. For example, the portion of the Communications Act which establishes the Corporation for Public Broadcasting states:

> Public television and radio stations constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems through community programs and outreach programs.

47 U.S.C. § 396.

46. The Commission, in another educational service, has likewise recognized the importance of localism. In the Instructional Television Fixed Service (ITFS) the Commission adopted a point system in which the local nature of the applicant was the most determinative factor.[32] *See Second Report and Order, ITFS*, MM Docket No. 83-523, 101 FCC 2d 50 (1985), *recon. denied Memorandum Opinion and Order*, MM Docket No. 83-523, 59 R.R.2d 1355 (1986). As we noted in the *Further Notice*, the ITFS and NCE services are not identical. NCE stations are broadcast services intended to educate the general public in a variety of settings, whereas ITFS stations are nonbroadcast services, intended primarily to provide formal educational programming to enrolled students of accredited schools. Nevertheless, education is a primary objective of both services, and our finding in the ITFS proceeding that education is essentially a local undertaking, is equally applicable to the NCE broadcast service. Likewise, our observation in the ITFS proceeding that local entities best understand the educational needs and academic standards of their communities and are the best authorities for selecting programming to meet those needs is relevant here. *Second Report and Order, ITFS*, MM Docket No. 83-523, 101 FCC 2d 49 (1985). While we recognized in that proceeding that non-local entities can complement the service offered by local licensees, and that there are actions that non-local entities can take to mitigate their lack of local credentials, we found local entities preferable from a public interest perspective because local entities

[32] The Balanced Budget Act of 1997 did not exempt ITFS from auction and, thus, point systems are not now used in ITFS. *See* 47 U.S.C. § 309(j).

have more expertise and accountability when it comes to serving the educational needs of the local community. *Id.*

47. The joint comments of National Public Radio, Association of America's Public Television Stations, and the Corporation for Public Broadcasting, provide publicly available data and studies evidencing the importance that localism plays in NCE broadcasting. They note that information compiled by the Corporation for Public Broadcasting (CPB) indicates that most of public broadcasters funded by CPB are local.[33] They maintain that the preponderance of local entities in NCE broadcasting results in local programming. Of 633 NCE radio stations participating in a study, 100% air some local programming. On average, local programming constituted 50% of public radio stations' weekly broadcasts.[34] In addition, 95% of all public television stations receiving CPB grants reported providing instructional service to schools during the 1995-96 academic year, including 81% providing instructional programming to elementary schools and 79% providing instructional programming to secondary schools during that time period.[35] We believe that such studies demonstrate the unique role of locally based entities providing NCE local educational programming and that our selection process should continue to foster this role.

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[33] *Comments of NPR, et al.* at 11, n. 20 *citing Corporation for Public Broadcasting, Frequently Asked Questions About Public Broadcasting* (1997) (www.cpb.org/content/faq).

[34] *Comments of NPR, et al.* at 12, n.21 *citing Public Radio Programming Study, Fiscal Year 1996*, Research Note No. 105 (November 1997).

[35] *Comments of NPR, et al.* at 12, n.22 *citing Elementary and Secondary Educational Services of Public Television Grantees: Highlights from 1997 Station Activities Survey* (November 1997).

48. Given the special, long-recognized, significance of localism to noncommercial educational broadcasting, we will award points for localism in a manner that does not implicate the concerns raised by the court in *Bechtel*. In addition to the ample documentation of the pivotal role traditionally assigned to localism, as reflected in the statute, Commission policies, and publicly available data evidencing industry practice, our experience has been that NCE licensees are transferred and assigned less frequently than commercial licenses.[36] As a result, the public interest advantages derived from localism are likely to have a more lasting impact than was the case in the commercial context, where the court found we lacked evidence as to "how long the typical successful applicant adheres to his integration proposal." *Bechtel*, 10 F.3d at 880. Further, to ensure that the benefits of localism are not purely ephemeral and as supported by numerous commenters, we have, as discussed in greater detail below, decided to establish a four year holding period of on-air operations during which licensees would be required to maintain the characteristics for which they receive credit in a point system.

49. Finally, the public interest significance of localism is not diluted by an artificially complex formula that elevates

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[36] Typically, less than one percent of NCE radio or television stations are assigned or transferred in a year. For example in calendar year 1998, we received only three applications to assign or transfer NCE television licenses and permits, less than one percent of all NCE television stations. During the same period there were 230 applications to assign or transfer commercial television station licenses, which in relation to the number of commercial television stations is approximately 18 percent. Radio statistics are similar. In a recent 12-month period, less than one percent of the total radio assignment and transfer applications were for NCE FM radio stations.

quantitative over qualitative considerations. Rather, we adopt a straightforward credit, with minimum eligibility requirements only as necessary to ensure that the credit is reserved for truly local applicants and thus fosters participation by local entities in noncommercial educational broadcasting. *See* paragraphs 54-55 *infra*. Significantly, that credit is not tied to ownership or a promise to work a minimum number of hours each week at the station, and does not endorse a particular type of business structure or practice. Its premise, moreover, is not simply area familiarity or uniquely responsive programming but the recognition that education historically is a local undertaking, as evidenced by the historical importance of localism in noncommercial educational broadcasting.

50. Notwithstanding clear factual distinctions between the integration criterion invalidated by the court in *Bechtel* and the award of points for localism in selecting among competing applicants for the reserved band, we acknowledge that there is a certain tension with our decision to dispense with comparative hearings in the commercial context. Following *Bechtel* and the resulting freeze on the adjudication of comparative broadcast cases, Congress enacted legislation authorizing the use of auctions to resolve mutual exclusivity among competing applications for commercial broadcast licenses. Faced with a choice of using either auctions or comparative hearings to resolve a select group of pending cases, the Commission determined that the public interest would be better served by using auctions. Given the court's sweeping criticism of our integration criterion, and especially in light of the congressionally endorsed alternative of using auctions, we were reluctant to resurrect elements of that criterion – such as local residence – recognized by the *Bechtel* court as

having potential public interest significance in selecting a broadcast licensee, at least in certain circumstances. Auctions would be speedier and fairer, we concluded, and would avoid the delay entailed in developing and defending new selection criteria to resolve the limited number of pending commercial cases in which auctions were not required.

51. Here, however, using auctions to select among competing applicants for spectrum reserved for noncommercial educational broadcasting is not a viable option from a policy standpoint and, in fact, such applications are beyond the Commission's competitive bidding authority under Section 309(j)(2)(C). In these circumstances and especially given that education historically is a local undertaking, we conclude that it is appropriate to incorporate a localism credit in the point system we adopt today to resolve competing applications for noncommercial educational channels.

52. We have considered, but disagree with, the minority viewpoint that a credit for localism would adversely impact religious organizations or small organizations. A localism credit is religion-neutral and size-neutral. Whether religious or secular, large or small, an organization based in the local community would qualify for the credit. Moreover, organizations both with and without religious affiliation, and of varying sizes support a credit for localism.[37]

53. Accordingly, we will adopt a credit for established local applicants. In the ITFS point system, local applicants

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[37] *See, e.g. Comments of Colorado Christian University* at 12-13 (organization with religious affiliation).

received four out of a possible eleven points. *See* 47 C.F.R. § 73.913(b). We believe that local applicants should receive points in a similar proportion in the NCE point system, and thus will assign established local applicants three instead of the two points originally proposed. We had proposed that to qualify for the credit, local entities would demonstrate that they could meet their educational goals *only* with a local station, such as one on an applicant's college campus, and not with a station located further away. We will not adopt this proposal, finding it sufficient for applicants to demonstrate that they are local and established, as defined below.

54. There is disagreement in the comments about who should be considered local. NPR, for example, defines local as (a) located within 100 miles of the proposed facilities; (b) located within the same state; or (c) if part of a state-wide plan, located in the same state or a bordering state. Others think that this proposal is too broad, particularly with respect to stations located in large states. Americans for Radio Diversity would consider a group local if the licensee or the majority of the governing board is located within 25 miles of the transmitter. We will base the definition of local on the standards used in ITFS, as modified in response to commenter suggestions. Those physically headquartered, having a campus, or having 75% of board members[38] residing within 25 miles of the

[38] We note that under basic eligibility requirements for NCE television applicants, there must be a majority (over 50%) of local board members in non-government entities. These local members must be broadly representative of elements of the community, as traditionally considered, (e.g. businesses, civic groups, professions, religious groups, schools, government). *See Ascertainment of Community Problems by Broadcast Applicants*, 41 Fed. Reg. 1372, 1384 (January 7, 1976).

reference coordinates of the center of the proposed community of license[39] would be local for purposes of the credit. Governments would be local throughout the area within which their authority extends. For example, the New York State government would be considered local throughout New York State, including New York City, but the New York City Board of Education would be local only in New York City (or within 25 miles from the reference coordinates of the proposed community of license). These characteristics would be maintained in various ways, including a holding period discussed *infra*; a local main studio in radio; or by-laws requiring a 75% local board for non-governmental NCE organizations. As in ITFS, a local headquarters or residence must be a primary place of business or primary residence and not, for example, a post office box, lawyer's office, branch office, or vacation home, which would not provide sufficient contact between the station's decision and policy makers and the area to be served. Our localism credit encompasses many of the other localism-based credits suggested by the commenters and thus we will not adopt separate credits for factors such as enhanced local representation on the governing board.

55. In the *Further Notice* we proposed that local applicants be "established" in order to receive the credit. This

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[39] This mileage standard is similar to that which applies to the main studio location of commercial stations. *See Report and Order, Commission Rules Regarding the Main Studio*, MM Docket No. 97-138, 13 FCC Rcd 15691 (1998), *aff'd* 15 Com Reg. (P&F) 1158 (1999). A community's reference coordinates are generally the coordinates listed in the United States Department of Interior publication entitled "Index to the National Atlas of the United States." An alternative reference point, if none is listed in the Atlas Index, are the coordinates of the main post office. *See* 47 C.F.R. § 73.208(a)(1).

requirement would serve to limit the feigning of local qualifications, and also to establish the applicant's educational credentials in this particular area. The *Further Notice* proposed that an applicant be local for two years prior to application, as the standard for whether an organization qualified for a local credit. Few commenters address the time period. We will adopt the two year benchmark as proposed.

d. State-Wide Network Credit (2 points)

56. We asked whether we should award points for stations that would be part of an existing education plan of a state government. We noted in the *Further Notice* that since the very early days of NCE broadcasting, state-wide networks have ensured that educational programming is available throughout a specific area in a coordinated and organized manner most appropriate to that area, and especially to schools. Stations providing programming in furtherance of such plans have been pioneers in NCE service, often using the economic efficiencies of a centralized point of operation to bring new service to outlying areas within their jurisdiction. However, without a credit recognizing the merits of such applicants, an entity serving multiple schools, such as a state university system, might not be able to effectively compete in a point system. For example, the locations of a university system's campuses, and the possible overlapping signals of its associated broadcast stations, might consistently prevent the university system from receiving a credit for local diversity, making it difficult for the university to expand the reach of its educational programming.

57. Only a few commenters addressed this issue, and those discussing the issue focus on whether the credit would be available to government supported networks only, or also to private networks. National Public Radio proposes that governmental licensees who apply for a new station as part of a governmental state-wide plan would receive credit for diversity of ownership regardless of the number of stations already owned, because state licensees have a special interest in and responsibility for serving the diverse needs and interests of their jurisdictions. *Comments of NPR* at 21. Sound of Life, Inc., opposes a credit for governmental state plans, which it views as a government choice of one type of program content over another. Others believe that private organizations should also qualify for a state-wide network credit. For example, Colorado Christian College, a private institution, considers itself to operate a state-wide educational network because it is an accredited school operating five full-time campuses throughout the state of Colorado, has three FM stations and many translators, and wishes to establish more stations as its college establishes campuses in more areas. Some commenters would extend the credit further to include all networks, including private networks covering regions larger than a single state.[40]

58. We have decided to adopt a two point credit that will be available to both public and private entities, a larger class of applicants than originally proposed. While we recognize above that applicants proposing new NCE stations in areas where they do not operate any other station provide the benefits accruing from diverse local

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[40] *E.g., Comments of Taylor University Broadcasting* at 2; *Comments of Cedarville College* at 4-5.

ownership of broadcast facilities, we also recognize the distinct benefits afforded by state-wide networks providing service to accredited schools. In our efforts to recognize the benefits provided by the former category of applicants, we do not wish to disadvantage the latter applicants, where the proposed new station will increase the number of schools served. Therefore, we will award a credit to the following entities if they cannot claim a credit for local diversity of ownership:

(A) an entity, public or private, with authority over a minimum of 50 accredited full-time elementary and/or secondary schools within a single state and encompassed by the combined primary service contours of the proposed station and its existing station(s), if the existing station(s) are regularly providing programming to the schools in furtherance of their curriculum and the proposed station will increase the number of schools it will regularly serve;[41] or

(B) an accredited public or private institution of higher learning with a minimum of five full time campuses within a single state encompassed by the combined primary service contours of the proposed station and its

[41] In selecting the number of schools, we relied on statistical information in the comments that small community television stations receiving funding from the Corporation for Public Broadcasting provide programming to a median number of 14 school districts with 103 schools. *Comments of NPR, Chart II.* Thus, a number of fifty elementary and secondary schools is approximately half the median number of schools currently served by the smallest NCE television licensees. We believe it is appropriate to adopt this number, to establish a standard that can apply both to radio and television, with radio capable of covering smaller areas than television.

existing station(s), if the existing station(s) are regularly providing programming to campuses in furtherance of their curriculum and the proposed station will increase the number of campuses it will regularly serve;[42] or

(C) an entity, public or private, with or without direct authority over schools, that will regularly provide programming for and in coordination with an entity or institution described in (a) or (b) above for use in its school curriculum.

59. Thus, the applicant need not be a government entity or a school itself to qualify for this credit. Both public and private licensees can provide educational programming material for use in accredited schools, in cooperation with an entity with authority over schools. One way for a private applicant to receive this credit would be for it to coordinate with a state government and to participate in the government's state-wide education plan. Because the state government has jurisdiction over schools, and the private entity would be operating in accordance with that plan, the Commission could be confident that stations broadcasting pursuant to the state plan would present programming that could be used in schools for educational purposes. Another way for a private applicant to receive this credit would be to coordinate with a private school

[42] Colleges and universities, in general, draw students from larger areas and serve more students than elementary and secondary schools. We selected five full-time in-state campuses of an accredited institution of higher learning based on our view that Colorado Christian College was reasonable in believing that broadcast service to five such campuses was similar to a state government's network.

system. For example, an archdiocese might, on its own, or in cooperation with a broadcast organization, wish to broadcast educational programming that could be used in schools under the archdiocese's jurisdiction. Thus, we clarify for the commenters who view this credit as favoring government speakers over private speakers, that is not our intention. In response to commenters who are concerned about fairness to nonprofit corporations, who are not themselves eligible for accreditation because they are not institutions of learning, we clarify that such corporations may nevertheless qualify for the credit if they are providing programming to accredited schools in coordination with those schools.[43] *See* 47 C.F.R. §§ 73.503 (a) and 73.621(a).

60. In this manner, applicants who will provide educational service to many schools, but who cannot achieve that goal without some signal contour overlap and resulting loss of the local diversity credit, will not be placed at a disadvantage in comparison to applicants serving a smaller number of schools. An applicant serving many schools would receive two points as a state-wide network, while a competing applicant serving fewer schools would likely receive an equal number of points for local diversity of ownership, because its service to fewer school locations increases its ability to avoid signal overlap. No entity may claim both the diversity credit and the state-wide network credit in any particular application. We recognize that there are also larger national and regional networks of noncommercial stations that enjoy some of the same operating efficiencies as the entities who will be eligible

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[43] *Comments of Faith Broadcasting, Inc.* at 8; *Comments of Houston Christian Broadcasters* at 13-14.

for this credit, but which do not have relationships with and provide program service to accredited schools. Those types of networks will not be eligible for this credit. As those larger networks are spread out over wider areas, they would not generally experience the same level of difficulty achieving local diversity as state-wide networks. Further, we do not believe that national and regional networks are able to provide equivalently focused educational benefits. Such networks are generally satellite operations of distant stations, without the ability to set the educational policies for schools or have schools accountable to them. It would thus be unlikely for schools to rely on such networks to provide programming on a regular and ongoing basis that complements or reinforces a locally established curriculum. As we stated regarding national networks in the ITFS proceeding, "a national educational network may relay programming throughout the country including to schools but an in-state consortium is an adjunct of the schools themselves." *Memorandum Opinion and Order, ITFS*, MM Docket No. 83-523, 59 R.R.2d 1355 (1986).

61. We note that Section 73.502 of our rules currently states that we should consider in licensing NCE FM stations "the extent to which each application meets the requirements of any state-wide plan for noncommercial educational FM broadcast stations filed with the Commission, provided that such plans afford fair treatment to public and private educational institutions, urban and rural, at the primary, secondary, higher, and adult educational levels, and appear otherwise fair and equitable." 47 C.F.R. Section 502. This rule does not define the term 'state-wide plan,' but appears to use the term in a narrower sense than the state-wide network credit we are

adopting today. Because Section 73.502 is superseded by the rules we adopt in this proceeding, we will eliminate it and incorporate the revised definition of state networks into our new point system rules.

e. Consideration of Minority Control Deferred

62. In the *Further Notice* we asked for comments on whether applicants controlled by minorities should be given any points, to further diversify the NCE mass media service. We noted that any race-based preference would need to withstand strict scrutiny pursuant to *Adarand Constructors v. Pena*, 515 U.S. 200 (1995). Most commenters addressing this issue are opposed to adopting a minority preference at this time. Alaska Public Telecommunications believes that such a preference is unnecessary because NCE broadcasters have a long history of providing diverse programming to underserved audiences, particularly minorities and children, without any such preference. Others are concerned about a possible constitutional challenge under *Adarand*.[44] We find particularly persuasive the views of the National Federation of Community Broadcasters (NFCB). NFCB suggests that we continue to conduct necessary fact-finding studies to justify minority preferences under *Adarand*. If the results of the studies support a minority preference, NFCB urges us to commence a rule making proceeding at that time to add a minority credit to the point system adopted

[44] *E.g. Comments of Cornerstone Community Radio* at 3; *Comments of Pinebrook Foundation, Inc.* at 6.

herein. We will adopt this suggestion, and defer consideration of a minority control credit until we have additional information from ongoing studies.

f. Other Factors Not Selected

63. We received several suggestions of other possible factors, which we have considered for inclusion in a point system but have decided not to adopt. Most of these factors were supported only by the commenter who proposed the idea. A few, however, received more support. We will address briefly the four ideas which received the most discussion.

64. **Existing Broadcasters.** There were several proposals that would favor existing broadcasters or existing stations in some way. For example, there are suggestions that existing translators be given preference to upgrade to full service stations, that experienced broadcasters receive additional points, and that existing stations making major changes be preferred over new stations.[45] While maintaining existing service is a good goal, so is obtaining new service. We do not believe that a case has been made for always favoring one over the other as a general practice in NCE broadcasting.[46] With respect to favoring experienced broadcasters over newer broadcasters, we also cannot

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[45] Since the adoption of the *Further Notice* the Commission has, in a separate proceeding, more narrowly defined what constitutes a "major change." More NCE upgrades are now considered minor and not subject to competing applications. *Report and Order, Streamlining of Radio Technical Rules*, MM Docket No. 98-93, 19 Com Reg (P&F) 329 (1999).

[46] This decision is comparable to our decision in the *Competitive Bidding* proceeding to have applicants for new stations and applicants for major changes to existing stations compete equally in auctions.

categorically conclude that one is always preferable to the other. An experienced broadcaster has a level of expertise that a novice may lack. Thus, our old commercial comparative criteria considered an applicant's broadcast experience. We also recognize, however, that new entrants bring new ideas and diverse voices to broadcasting. Thus, we have, in commercial auctions proceedings, established a bidding credit for new entrants. Because we cannot conclude as a general matter that broadcast experience is always preferable to new voices and diversity in the context at issue here, we decline to adopt any credit for this factor.

65. **Locally-Originated Programming.** Several commenters address local programming as part of a point system. For example, the National Federation of Community Broadcasters suggests that we award one point if members of the local community will have access to the proposed station to air programming, and between two and five points depending on the percentage of locally originated programming (between 10% and 75%) that the applicant will provide. WAY-FM, Inc. opposes such a credit. It states that a local programming credit would amount to a government intrusion into issues of program content, implicitly supporting certain types of programming over other types of programming. It also states that it would be difficult to define local programming, and even more difficult to ensure that broadcasters fulfill their commitment.

66. We will not adopt points for local programming or local access. We have historically afforded full power broadcast licensees, commercial and noncommercial, maximum flexibility in selecting programming that the

licensees, in their discretion, believe will address local needs. The record in this proceeding provides no basis for departure from that policy. We note that the local nature of programming is relevant to applicant selection in the newly created low power FM service[47] and to applicant eligibility in the Class A low power television service. However, both of those services are highly localized in nature, covering limited areas with reduced power facilities. We do not find the considerations that led us to give weight to program origination in authorizing these services of equal import in initial selection among applicants for full service NCE broadcast stations, which have broader goals and a wider signal range. We further note that there is currently an open question, in the digital television proceeding, of whether to quantify public interest programming requirements for all television licensees. We believe that such matters are most appropriately debated as service-wide rules, as in that proceeding, and not in the present proceeding which concerns only construction permits for new stations.[48]

67. **Funding Sources.** Several organizations support preferences based on funding. National Public Radio, for example, states that we should prefer applicants who have been found eligible for the government-administered Public Telecommunications Funding Program (PTFP). It says that PTFP qualified applicants have already passed a

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[47] *See Report and Order, Creation of Low Power Radio Service*, MM Docket No. 99-25 (January 27, 2000) (awarding points to LPFM applicants airing at least eight hours a day of programming produced within ten miles of the community.)

[48] *See Notice of Inquiry, Public Interest Obligations of TV Broadcast Licensees*, MM Docket No. 99-360 (Dec. 20, 1999).

public interest test, based in part on the Commission's spectrum efficiency objectives. National Religious Broadcasters opposes such a credit because it says that organizations with religious affiliations are not eligible to apply for government funding. We do not believe that there is a sufficient basis for our adopting funding criteria as an additional credit. When we award a permit to a qualified applicant, the permittee may construct the station with public grant monies for which it is eligible, or with private monies which it has secured. The public interest factors that we believe are important to the selection of NCE licensees and incorporated in our point system, generally account for the public interest considerations that are applied in the PTFP award program. We therefore see no reason to include a separate point based on funding sources.

68. **Finder's Preference**. Related to the first to file approach rejected above, several commenters support awarding credit in a point system to the first applicant to file its application. These commenters seek to distinguish between applicants who undertake the engineering and legal studies needed to identify an available channel from challengers filing "me too" applications.[49] The impetus for the finder's preference suggestion appears to be commenter frustration with the current A/B cut-off system for NCE applicants, in which initial applications are announced on a public notice, triggering an opportunity to file competing applications. This process often results in mutually exclusive applications. As discussed *infra*, we will address those concerns by changing the filing procedures to a window

[49] *Comments of Dale Jackson* at 2-3; *Comments of Cornerstone Community Radio, Inc.* at 2.

system. We therefore find further consideration of a finder's preference unnecessary.

C. Tie Breakers

69. In a point system it is possible that two or more applicants may receive the same number of points. We asked for comments on how to break such ties. The *Further Notice* discussed, but tentatively rejected, use of a "finder's preference" as a tie breaker. Among the options that we considered more viable were mandatory share-time arrangements; a tie-breaker lottery weighted in accordance with statutory requirements; and use of a secondary factor, such as one considered for the primary point system but not adopted.

70. The commenters discuss various tie breaker options and there is some support and opposition to each. Some considered lotteries less objectionable as a tie breaker than as a primary selection process,[50] but others remained concerned about the required statutory weighting.[51] A tie breaker based on the first applicant to file would be an objective method, but commenters expressed concern that any first to file method would encourage "speed over need"[52] and "races" to the filing room.[53] One commenter suggests that we use traditional hearings to break ties,[54]

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[50] *See Comments of CSN International* at 3; *Comments of Sound of Life, Inc.* at 16.

[51] *See Comments of National Public Radio* at 27.

[52] *See Comments of Colorado Christian University* at 16.

[53] *Comments of Roaring Fork Public Radio Translator, Inc., et al.* at 5.

[54] *See, e.g. Reply Comments of Center for Media Education, et al.* at 16-17.

but the record contains significant support for eliminating traditional hearings. Moreover, given the extensive resources required, it is difficult to justify conducting a full-blown hearing, when the differences among the applicants are admittedly slight. Many commenters considered mandatory timesharing unworkable for applicants and believed it should not be used as a tie breaker.[55]

71. Some commenters believe that tied applicants will be able to work out a tie breaker solution on their own, if given a reasonable settlement period, and that a tie breaker should only be used after providing such a settlement period.[56] For cases in which a settlement can not be reached, a number of commenters suggest that we should establish a new factor to serve as a tie breaker, such as awarding a license to the applicant with the fewest pending applications at the time of filing.[57] They state that an applicant with many applications is likely to secure a license elsewhere, while an applicant with few applications has likely determined that only these few locations would serve its educational purpose. Other commenters suggest that the Commission choose a solution that allows it to grant as many of the applications as possible, either by suggesting engineering solutions to the applicants or by granting whatever combination of licenses would result in the most successful proposals. For example, if two applications could be granted but for the existence of a competing

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[55] *E.g., Comments of Station Resource Group* at 19; *Comments of Alaska Public Telecommunications* at 15.

[56] *See generally Reply Comments of Mohave Community College* at 12.

[57] *See Comments of National Public Radio, et al.* at 26-27; *Comments of KBPS Public Radio Foundation* at 2.

third application, one commenter suggests that we should grant those two.[58]

72. After considering the comments, we have concluded that, if there is a tie, we will conduct a tie breaker that combines and follows several suggestions of the commenters, and that is structurally similar to the tie breaker formerly used in the ITFS service. *Third Report and Order, Instructional Television Fixed Service*, MM Docket No. 83-523, 4 FCC Rcd 4830 (1989). Under the tie breaker, a permit will be awarded to the applicant who, at the time of filing, had the fewest existing station authorizations (licenses and construction permits) in the same service (*i.e.* radio or TV whether commercial or noncommercial) nationally.[59] Stations of the applicant itself and those with attributable interests, as discussed below, will be counted for this determination. This should help to address the commenter concern that small local educators with no or few other broadcast interests should not be "squeezed out" by large national chains of NCE stations. As indicated above, we do not believe that national ownership factors are especially important in making an initial determination of the applicant's quality in the initial stages of a point system, but we do believe, among equally qualified applicants, that the public should have the opportunity to

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[58] *Comments of Colorado Christian University* at 17.

[59] For purposes of counting same service stations in a tie breaker, we would require NCE radio applicants to count all attributable radio stations (AM and FM, commercial and noncommercial). NCE television applicants would count all attributable television stations, commercial and noncommercial. FM translator applicants would generally count all attributable FM translator stations that are not fill-in stations, except that if competing applicants have only fill-in translators, then we will compare the number of fill-in stations.

receive service from the applicant who has the fewest existing outlets to express a particular viewpoint.

73. As a secondary tie breaker, we will consider which applicant has the fewest pending new and major change applications in the same service at the time of filing. This factor, suggested by the commenters, encourages applicants to file judiciously, to conserve spectrum, and to reduce the number of speculative "me too" applications. We choose this as a secondary tie breaker, although the commenters suggested it as a primary tie breaker, because an applicant with many pending applications merely has a greater possibility of obtaining more stations, whereas an applicant with more permits and licenses has already achieved that goal.

74. As a final tie breaker for full service stations we will impose mandatory time sharing. In so doing, we recognize that this option is very unpopular. Most commenters believe that time sharing is confusing to listeners, prevents consistency in programming, and is especially difficult for organizations that do not share the same ideologies.[60] We are not unsympathetic to the points raised by these commenters. Even some of these commenters, however, recognize that time sharing may be useful as a settlement tool or as a tie breaker of last resort. Although we are not adopting a formal settlement period, so as not to unduly delay the award of permits in cases where the parties are not interested in settlement, we stress that parties are free to settle at any time during the process. Our general rules for broadcast settlements will apply,

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[60] *E.g. Reply Comments of Center for Media Education, et al.* at 18-19.

including the requirement that the settling parties certify that they have not received consideration in excess of their legitimate and prudent expenses. *See* 47 C.F.R. § 73.3525. We are not adopting the suggestion of licensing two stations over one, in the event of a three-way tie. We see this suggestion as one best considered by the applicants themselves as part of any settlement negotiations that they may undertake voluntarily.

D. Attribution Issues for NCE Point System

75. Several of the factors in the NCE point system including local diversity, localism, and the tie breakers, are based on whether the applicant also has interests in other broadcast stations. As we discussed in the *Further Notice*, the methods for determining control of commercial broadcast applicants are not always applicable to noncommercial applicants, who are often non-stock corporations, governed by a frequently changing board of directors who serve voluntarily or by appointment. At present, our rules establish attribution policies for commercial stations, but not for noncommercial educational stations, because attribution has generally been considered only in the context of ownership limits, and there are no limits on the number of NCE stations that any one entity can own.[61] There was little discussion of this point in the comments. We have decided, to the extent possible, to base noncommercial attribution

[61] *See* 47 C.F.R. § 73.3555, note 2. *See also Notice of Inquiry*, MM Docket No. 89-77, *Transfers of Non-Stock Entities*, 4 FCC Rcd 3403 (1989) (asking at what point we should consider a transfer of control to have occurred in non-stock organizations for purpose [sic] of requiring prior Commission consent).

standards for consideration in applying an NCE point system on the commercial framework, as well as on the policies that have been used in the educational ITFS service, with several adjustments to account for structural differences in NCE organizations.

76. In the ITFS point system, we looked to the composition of an entity's governing board to determine control. *Memorandum Opinion and Order, ITFS*, MM Docket No. 83-523, 59 RR 2d 1355 (1986). In that service, we did not specifically address changes that might occur in the governing board. We did, however, consider that local and nonlocal organizations might jointly form new corporations, and that it would only be appropriate for such organizations to receive points for localism if the local entity had the majority of representation on the board and if the board's officers were appointed by the board itself and none of the officers were affiliated with a nonlocal participant.

77. To determine an NCE applicant's other interests, for purposes of applying an NCE point system, we will attribute the interests of the applicant, its parent, and its subsidiaries, their officers and members of their governing boards. This standard is similar to commercial attribution standards in which directors, officers, and voting stockholders in a commercial entity have attributable interests. *See* 47 C.F.R. § 73.3555 note 2. Thus, even if an NCE organization and its parent organization do not have any other broadcast interests, we would also look to the interests of officers and directors, as we do for commercial applicants. For example, if the president of an applicant for a new NCE television station also serves on the board of another local television station, or if a board member of an NCE radio applicant has attributable interests in a

nearby commercial radio station, those other stations would be attributed for determining whether the applicant qualifies for a local diversity credit in the NCE point system.

78. So that points awarded to an applicant based on the composition of its governing board will remain meaningful, despite anticipated board changes, we will award points only to organizations whose own documents, (e.g. by-laws, constitution, or their equivalent) establish requirements for maintaining the characteristics of the board for which it claims credit. For example, we would grant credits to an organization seeking a credit for diversity, if its governing documents limit the degree to which incoming Board members can have interests in other local stations. While we understand that NCE groups cannot control the resignation of Board members, we expect that they will act quickly to replace Board members to maintain characteristics of the Board for which credit was awarded. We understand that most organizations do not have such provisions in their current governing documents, and that amending the documents to provide this safeguard may require a vote by the organization's members. Accordingly, we will provide a period for amendment, as discussed in paragraph 91 *infra*.

79. We also recognize, as we have in commercial broadcasting, that people or entities not represented on the Board of Directors may nevertheless exert significant influence over an NCE licensee by supplying substantial funding and programming to a station. We are already receiving applications for NCE stations, disclosing that, pursuant to an agreement between the applicant and an existing broadcast licensee, the existing licensee will finance construction of the new station in exchange for a

commitment to air a majority of that licensee's programming. Accordingly, consistent with the attribution standards applied to commercial broadcasters, our point system will attribute the interests of entities providing more than 33 percent of equity and/or debt, and (1) who supply more than 15% of the station's weekly programming or (2) who have attributable interests in media in the same market. *See Report and Order, Attribution of Broadcast and Cable Interests*, FCC 99-207 (Aug. 5, 1999). We believe that this method of attribution is compatible with and should not have any impact on traditional NCE funding and programming relationships, because traditional sources of NCE funding (such as the Corporation for Public Broadcasting, financial institutions, and major donors) and of NCE programming, (such as the Public Broadcasting Service) are not generally broadcast licensees and thus will have no broadcast interests to attribute.

E. Delegated Authority

80. By statute, only Administrative Law Judges, individual Commissioners, and the Commission are permitted to apply a point system. 47 U.S.C. § 155(c)(1); *See Further Notice*, n. 22. This is because a point system is technically considered a type of simplified hearing. We believe that it would be preferable and more streamlined to delegate responsibility for an NCE point system to the staff, and will seek appropriate legislation to do so. We secured similar legislation permitting staff consideration of ITFS point system proceedings. *Id. See also ITFS Processing Issues*, 11 FCC Rcd 12,380 (1996). So as to not further delay this process, the staff is directed to refer these cases to the Commission until legislation can be introduced and acted upon. If we receive legislative authority, we will

delegate responsibility to process applications using the NCE point system to the Mass Media Bureau.

F. Application Procedures and Post-Award Requirements

81. The *Further Notice* asked commenters to address application procedures and requirements that prevailing applicants must meet after award of the permit. We especially asked for suggestions on how to prevent speculation and abuse in NCE licensing. Among possibilities presented for comment were replacing the current A/B cut-off method, now used to receive applications, with periodic filing windows, and establishing a holding period during which applicants would be required to maintain the characteristics identified in their applications.

1. Potential for Abuse

82. Commenters believe that speculation is a problem in NCE broadcasting.[62] Among the factors that commenters believe lead to the potential for abuse are the lack of multiple ownership rules restricting the numbers of NCE applications that can be filed, a liberal main studio waiver policy for NCE stations, the filing freeze on (and now auction of) commercial channels which makes NCE the only new broadcast frequencies available, and the lack of filing fees and regulatory fees for NCE stations.[63]

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[62] *E.g., Comments of CSN International* at 3; *Comments of Alaska Public Telecommunications et.al.* at 5-6; *Comments of Educational Information Corporation* at 14-16.

[63] *Comments of Station Resource Group* at 3.

83. A major concern was the filing of "copy cat" or "me too" applications in which groups become interested in applying for a radio station in a particular area only after learning that another applicant has applied.[64] Sometimes these "copy cat" applicants photocopy the first applicant's information and use it as their own. Commenters state that some applicants apply for the same channel as the first applicant even if there are several alternatives available in the same vicinity. Another concern was that, without the scrutiny of traditional hearings, applicants who are not truly educational might try to pass as NCE organizations.[65] Similarly there was a concern that applicants might claim credits for which they did not qualify, or would alter the characteristics for which they received credits shortly after the permit issued.[66] Accordingly, the commenters support various options for limiting speculation at the application stage, and for ensuring that successful applicants live up to their promises.

2. Filing Windows to Replace A/B Cut Off

84. We will adopt a filing window process for accepting NCE applications, both for full service stations and for FM translators. Under current procedures, when we receive an NCE application we issue an "A cut off" public notice announcing its acceptance. The public notice triggers the filing of competing applications by announcing a date

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[64] *E.g. Comments of West Coast Public Radio, et al.* at 15; *Comments of Minnesota Public Radio* at 3; *Comments of American Family Association* at 2-3.

[65] *E.g. Comments of Educational Information Corporation* at 17-19.

[66] *E.g. Comments of National Public Radio, et al.* at 28-30; *Comments of Alaska Public Telecommunications, et al.* at 12-14.

certain by which any such applications are due (commonly referred to as "B" applications). Ideally, this process would notify others already considering similar proposals to file an application quickly, or lose that opportunity. In practice, however, the process has apparently led to speculation, in which "B" applicants with no prior interest in an area file applications in response to numerous "A" cut off notices. In the *Further Notice* we asked whether we should replace the current procedures with a window filing system. Under a window system, the Commission would periodically announce a window during which all applications could be filed. Thus, Commission action, rather than a specific application, would open a window in which all NCE applications could be filed. Applicants might thus file at the end of the window so as to lessen the potential for "copy cat" proposals. For commercial broadcast applications, we have replaced the previous A/B cut off system with filing windows. *See Competitive Bidding supra.*

85. The commenters support a move to a window filing system in the NCE service. According to commenters, cut off lists have become "shopping lists" for aggressive speculators, who monitor the lists to determine where to file next.[67] As noted earlier, Alaska Public Telecommunications indicates that over 400 of our current applications involve 15 to 20 applicants who have overfiled against each other in virtually every state. To further reduce the possibility of speculation, commenters suggest that we place a limit on the number of applications that an applicant can file within one window and within a year. West Coast Public Radio suggests that applicants be

[67] *Comments of Station Resource Group* at 7; *Comments of Pensacola Christian College.*

limited to five applications per window and up to a maximum of ten in a calendar year.

86. Upon consideration of the comments we conclude that it will serve the public interest to adopt a window filing system for NCE applications. We delegate to the staff the decision of when to open windows, and the length of advance notice given before a window opens, and other details concerning implementation of an NCE window filing system. We will not adopt the suggestion that applicants be limited in the number of applications per window or calendar year. We believe that the criteria in the point system established herein, combined with window filing procedures, should be sufficient to ameliorate the filing of large numbers of mutually exclusive applications by speculative, barely qualified, applicants. If the number of mutually exclusive applications received under the new system exceeds our expectation, we reserve the right to establish by public notice a limit on the number of filings per applicant in a given period.

87. At the end of a filing window we will review the applications only to determine which are mutually exclusive, and issue a public notice identifying applications that are mutually exclusive. Under the new window filing procedures, the specific facilities proposed in applications filed during a filing window will receive cut-off protection, and will be protected pursuant to our existing interference rules, as of the date of the closing of the window filing period. After the closing date of the filing window, no applications (such as minor modification applications) may be filed that would conflict with the applications filed during the window. The staff may, in its discretion, temporarily freeze the filing of minor modification applications during the window to limit the number of potentially

conflicting applications. Applications for minor modifications to existing stations are not limited to filing within windows, and would best be filed at any time before a window opens for major changes and new stations. The window filing procedures adopted herein do not change the acceptability criteria for noncommercial educational applicants.

3. Documentation/Petitions to Deny

88. A number of commenters request that we require applicants to file documentation of their claimed points, to enable applicants to verify or dispute claims made in competing proposals and file petitions to deny. According to West Coast Public Radio, the Commission will thus be able to rely on certification check off boxes without sifting through the documentation, but interested parties would have the opportunity to submit meaningful comments. NPR suggests that within 30 days of application, the applicant should supply its articles of incorporation, bylaws, audited financial statement, names and addresses of parent entities, officers and directors, sources of proposed funding, description of local elements on the board, lists of their other stations and pending applications, and engineering support for their claims of fair distribution. Alaska Public Telecommunications identifies additional types of documents that might be useful. For example, it suggests that applicants claiming to be established local organizations should document the length of their connection with the local area, such as with a certification by the Secretary of State where the organization was established. For applicants who are part of state-wide plans, this commenter would have the applicant provide a copy of the plan or similar documentation of participation. NPR states

that applicants would then file petitions to deny, with the FCC looking only at the petitions against the selectee.

89. We agree with the commenters that, while the application should be a simple one in which the Commission can rely on certifications, competing applicants should be able to verify that competing applicants qualify for the points claimed, and that the Commission should have access to the documentation for purposes of random audits. We have revised several of our application forms in this manner as a result of our *Streamlining* proceeding, and will institute random audits to verify the accuracy of the certifications. Likewise, we direct the staff to design a new certification-based NCE application form. The form should identify appropriate documentation that must be made available for the different points claimed. At the time of application, applicants must submit the required information to our public reference room, and place it in a file available locally. The Commission's staff will examine these documents in random audits and as described *infra*. This information will also assist parties in determining whether it is appropriate to file Petitions to Deny. Future applicants will submit documentation concurrently with filing.

90. We will examine each applicant's claimed points to determine the tentative selectee(s). Once we select our tentative selectee(s), we will conduct an acceptability study for the selected application(s). If a tentatively selected application is found unacceptable, it will be returned to the applicant. As under our existing standards for NCE stations, the applicant will be given one opportunity to submit a curative amendment, provided that the amendment is minor and that the application, as amended, has the same number of qualitative points as

originally claimed, or more than the points claimed by the next highest applicant. An applicant that does not meet acceptability requirements after this opportunity will be removed from the mutually exclusive group and will not be provided an additional opportunity to amend. This applicant may not apply for a station until the next filing window. A new tentative selectee will be chosen from the remaining applicants according to the point system. We thus caution applicants to take great care in preparing their applications. Once a tentative selectee's application is found acceptable we will announce that fact in a public notice, which would establish a due date for Petitions to Deny against the tentative selectee. *See* 47 C.F.R. § 73.3584.

4. Amendment of Pending Applications to Claim Points

91. All mutually exclusive NCE proposals, including any previously filed and/or designated for hearing will be evaluated by the point system. Mutually exclusive NCE applications already on file do not, however, contain the information that the Commission will need to make a selection under a point system. These existing applicants will be required to supplement their applications to make those applications consistent with the standards adopted.[68] We delegate authority to the staff to issue public notices announcing the procedures to be used in this process.

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[68] Where the relevant period for filing competing applications has closed, we will not reopen the filing period for additional competing applications.

5. Holding Period

92. In the *Further Notice* we asked about steps that we could take to ensure that our selection process is meaningful and not undermined by the rapid re-assignment or transfer of stations. We proposed to implement a holding period for NCE stations granted on a comparative basis, as a means of protecting the integrity of these grants. The *Further Notice* did not propose a specific length for a holding period, but discussed three and five year periods of on-air operations as possibilities. A few commenters, such as Community Television, Inc., think that a holding period is not necessary because frequent turnover of stations is not a problem in NCE radio, unlike commercial broadcasting. Most of the commenters, however, agree that NCE licensees should be required to hold stations for some minimum period of time. The commenters differ on the amount of time that they believe is an adequate holding period, but most suggest either three, five, or eight years.

93. We believe that if applicants are to be selected on the basis of their different characteristics, those characteristics should be maintained for a minimum period to be meaningful. We also believe that a holding period will limit speculation that might accompany reliance on a point system. We have chosen a four-year holding period of on-air operations because it is one which we think is sufficient to establish meaningful service for the community without any undue burden on the licensee.[69] This will

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[69] Prior to elimination of our anti-trafficking policy, we had a three year holding period on commercial broadcast licenses. *See Elimination of Three Year Rule and Underlying Anti-Trafficking Policy*, 52 RR 2d 1081 (1982), *reconsidered in part*, 99 FCC 2d 971 (1985). The *Bechtel* court questioned whether a three year holding period would have been sufficient to give meaning to the commercial integration credit given

(Continued on following page)

generally begin at the time of program tests. Four years is one half of the current eight year license period. Within a four year period, a new station would generally have established and implemented its educational programs, received feedback from the public it serves and the underwriters from which it is seeking financial support, and adjusted its programming accordingly. Thus, a four year holding period will apply to applicants selected through a point system. We do not adopt a holding period on assignments or transfers for licensees receiving no such points (such as non-mutually exclusive applicants, or licenses awarded through settlement), or for permits awarded through decisive Section 307(b) preferences. We direct the staff to modify the requisite assignment and transfer forms to reflect the holding period restrictions.

94. One commenter suggests that, to deter speculative applications, we should randomly audit the applicants within the holding period to see that they are maintaining the factors for which they received points.[70] We will adopt this suggestion and conduct random audits during the holding period, instead of our original proposal which would have required prevailing applicants to certify annually to their continued eligibility for the points they received. This will ensure that applicants are maintaining the factors for which points were awarded, without imposing reporting requirements on the applicants. Some factors will be maintained by conditions on the license

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the Commission's expectation that successful applicants adhere to their integration proposals on a permanent basis. But, as we noted in the *Further Notice*, the court's reasoning was based on considerations that are not applicable to the NCE service. *Further Notice* at note 29 *citing Bechtel v. FCC*, 10 F.3d at 880.

[70] *Comments of Dale Jackson* at 7-8.

itself. For example, we will condition permits on construction as proposed (or in the event of an involuntary loss of site, on replacement with an equivalent coverage of area and population). During the holding period, we will consider complaints alleging that the permittee is not operating pursuant to a proposal for which it received points, and take appropriate enforcement action.

95. We recognized in the *Further Notice* that circumstances may arise requiring some applicants to assign or to transfer control of a station before the end of the holding period, and asked how to address such circumstances. One option presented was to limit the permittee to recovery of its reasonable and prudent expenses. We asked commenters favoring this solution to address how to define reasonable and prudent expenses in the context of an operational station. We also asked for any other ways to address this issue.

96. Commenters such as Kaleidoscope Foundation would support limiting any licensee that transfers the station before the end of the holding period, to recovery of its reasonable and prudent expenses.[71] The Center for Media Education states that gradual changes in the composition of the board, which commenters view as inevitable, should not be considered violations of the holding period, provided that the licensee maintains the factors for which it received points. Commenters agree that reasonable expenses would include those associated with the application and construction. They differ on whether to include expenses for operating the station. Cedarville College says that such

[71] *E.g. Comments of Kaleidoscope Foundation, Inc.* at 4-5.

expenses should be reimbursable to the extent that operating costs are not offset by the station's or licensee's income. Station Resource Group argues that we should not allow recoupment of operating costs or of compensation to board members because these are not capital expenditures. Faith Broadcasting and Moody Bible Institute of Chicago believe that NCE applicants who experience difficulties during the holding period should be allowed to donate the station to another nonprofit organization for no consideration. Sound of Life argues that the station should go to the next applicant in the queue.

97. We have decided that from the grant of the construction permit through the four year holding period, NCE entities who must assign or transfer their permit or license will be limited to recovery of their legitimate and prudent expenses. We conclude that "legitimate and prudent expenses" as relevant here will include the costs of obtaining the permit and constructing the station, but will not include costs of station operations. To further ensure that the public receives the benefits to which it is entitled, during the holding period a proposed assignee of such a station will be required to demonstrate that it would qualify for the same or a greater number of points as the assignor originally received. We do not favor the suggestion that the licensee donate the station to any other non-profit organization of its choice, without regard to how well qualified that organization may be. This would not maximize the benefits that the point system is intended to achieve.

98. We generally agree with commenters that gradual changes in the board, of the type that ordinarily occurs in most NCE organizations, will not for purposes of a holding period be treated as the equivalent of a sudden transfer of

control or assignment. Nevertheless, we note that we have adopted several point factors that are board dependent, including diversity of ownership and localism. Such factors must be maintained despite board turnover. To address inevitable changes in board composition, we will award diversity and localism preferences only to organizations whose own governing documents ensure that these factors are preserved despite Board changes (*e.g.* whether existing and incoming board members can have other media interests and whether outgoing board members will be replaced with others who are similarly representative of the community).

G. FM Translators Operating on Reserved Channels

99. Translators are secondary stations that rebroadcast the signals of primary stations. Generally translators operate in areas where reception of the primary station would otherwise be poor. The *Further Notice* asked whether the same point system and procedures used for NCE primary stations should apply to NCE-FM translator stations operating on reserved channels. The *Further Notice* did not ask about television translator stations on reserved channels because there are no channels reserved for noncommercial television translators. We asked whether our new selection method should maintain any of the selection preferences in the current translator rule, 47 C.F.R. § 74.1233. We noted in particular that our rules currently favor "fill-in" translators, which fill in gaps in a primary NCE station's service area, over "other area" translators, which extend a primary NCE station's signal beyond its service area. We also noted that our current

translator rules use a first come, first served approach as a tie breaker.

100. Only two commenters addressed this issue in any depth. Alaska Public Telecommunications suggests that we maintain all of the current translator selection procedures without change. NPR suggests that we first examine translator applications as to fill-in/other area status, as we do currently, and apply a point system only if fill-in status is not dispositive. We will adopt NPR's suggestion. As in the current translator selection method, if there are any fill-in proposals, only those would be eligible for further consideration. Thus, if there is only one fill-in translator among the applications filed during the filing window, the permit will be awarded to that station. If there are multiple fill-in proposals to be compared, or if no applicant proposes fill-in service, we will apply the same point system as discussed above for full service NCE stations. As a tie breaker of last resort, however, we will retain the first come, first served method currently in our rules for NCE-FM translator tie breakers, rather than switching to the mandatory timesharing adopted for full service stations. We indicated in the *Further Notice*, that we were more inclined to adopt a first come, first served tie breaker for translators than for full service stations because we did not anticipate the same rush to file for translator stations. There was no significant discussion of this issue, and we continue to believe that a filing rush is unlikely for FM translator stations, which lack several advantages of full service stations, including interference protection from other full service stations and the authority to originate, rather than rebroadcast, programming.

H. Noncommercial Educational Applicants on "Commercial" Channels

101. Perhaps the most difficult question posed in this proceeding concerns NCE use of frequencies that are not specifically reserved for NCE use. In the past, NCE and commercial applicants were both able to compete for this spectrum under the rules applicable to commercial applicants. For example, NCE radio applicants on non-reserved radio channels had to meet the stricter engineering requirements applicable to commercial stations. When noncommercial educational applicants competed with commercial applicants for commercially available channels, they were all compared in a hearing using the standards applicable to commercial applicants. Given changes that have occurred in the commercial selection process, we must decide whether noncommercial educational entities can continue to compete with commercial applicants on non-reserved channels and, if so, how to select among competing commercial and noncommercial applicants.

102. The Balanced Budget Act generally requires that the Commission award licenses and permits through a system of competitive bidding if mutually exclusive applications are accepted for any initial license or construction permit. 47 U.S.C. § 309(j)(1). There are a few limited exceptions to the auction requirement, however. 47 U.S.C. § 309(j)(2). The exception relevant here, 47 U.S.C. § 309(j)(2)(C), states that auctions "shall not apply to licenses or construction permits issued by the Commission . . . for stations described in section 397(6)" of the Communications Act. Section 397(6) defines the terms "noncommercial educational broadcast station" and "public

broadcast station."[72] In the *Further Notice*, we observed that some parties construed the statutory language as limited in scope, merely indicating that auctions cannot be used on channels reserved for NCE use. Others, however, believed the language to have broader implications, requiring the Commission to design new non-auction procedures for use whenever an NCE applicant applies for a non-reserved channel. We did not find the legislative history to provide clarification. The *Further Notice* requested additional comment on this issue, and on whether NCE entities should remain eligible to compete for non-reserved channels.

1. Statutory Construction

103. The comments filed in response to the *Further Notice* continue to offer different interpretations of Section 309(j)(2)(C), and whether it pertains to applications by NCE entities for non-reserved channels. Generally, NCE organizations read the statute to always exempt NCE entities from auction, and commercial applicants read it as exempting only those channels reserved for NCE use. NCE entities argue that the statutory exception to auctions clearly is based on the applicants' eligibility to construct an NCE station and not on the particular channel for

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[72] The terms "noncommercial educational broadcast station" and "public broadcast station" mean a television or radio broadcast station which (A) under the rules and regulations of the Commission in effect on the effective date of this paragraph, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or (B) is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes. 47 U.S.C. § 397(6).

which the entity is applying. Thus, they maintain that NCE applicants are equally exempt from auctions on non-reserved channels as on reserved channels. As support for this position, NPR notes that the original House and Senate bills, which were not enacted, would have limited the auctions exception to reserved channels, but that this language was eliminated in the conference committee.[73] It argues that when Congress includes limiting language in an earlier version of a bill, but deletes it prior to enactment, it may be presumed that the limitation was not intended. *Russello v. U.S.*, 464 U.S. 16, 23-24 (1983). The commenters also supply various reasons why Congress could have intended NCE entities always to be exempt from auction. For example, they say that substantial public monies support NCE broadcasting, and that an NCE organization would have little hope of prevailing in an auction against a commercial enterprise.

104. NCE commenters particularly oppose the statement in the *Further Notice* that, if we read the language as an absolute exemption of NCE stations from auction, NCE entities may become disqualified from competing for non-reserved channels. Commenters say that non-reserved channels are important to NCE organizations, and that they operate on non-reserved channels for various reasons. These reasons include TV Channel 6 interference to certain reserved FM channels, interference by foreign stations, historic use of AM stations by NCE radio pioneers, historic use of VHF channels for wide area geographic coverage to fulfill statewide plans, donation of

[73] S. 947, 105th Cong., 1st Sess., § 3001(a)(1) (not enacted); H.R. 2015, 105th Cong., 1st Sess., § 3301(a)(1) (enacted as amended).

stations on non-reserved channels from commercial broadcasters to NCE entities, purchase of stations from commercial broadcasters, and vacant non-reserved allotments.[74] As an indication of the importance of non-reserved channels to NCE entities, NPR and AAPTS report that 37 of their members operate on non-reserved FM channels, 20 on non-reserved AM channels, and 15 on non-reserved TV channels. With respect to translators they say that many NCE-FM translators are on the non-reserved band, including 12 of Minnesota Public Radio's 18 translators, and that all TV translators operate on non-reserved channels because there are no TV channels reserved for educational translators.

105. In marked contrast, commercial applicants believe that Congress' clear intent was to mandate auctions on all non-reserved channels to balance the budget, and that the NCE language was meant only to clarify that reserved NCE channels are not to be auctioned.[75] DeLaHunt Broadcasting and Big Sky Broadcasting say that applying the auction exemption in Section 309(j)(2)(C) to non-reserved channels would subvert the statute's intent to balance the budget by overriding auctions every time an NCE entity applies for channels that could also be used commercially. As these commenters read the language of the Act, it is the nature of the allotment, and not the nature of the particular applicant, that determines whether auctions should be used. They maintain that non-reserved channels are allotted for commercial use and that a decision to program a station on these channels with noncommercial educational material

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[74] *Comments of University of California.*

[75] *E.g., Comments of Jack I. Gartner* at 2-3.

amounts to a choice of program format. Thus, they say that each applicant on a non-reserved channel chooses between a commercial or noncommercial format on a channel that is allotted for commercial use. They therefore maintain that nonreserved channels are always subject to auction, regardless of the voluntary program choices that applicants may propose.

106. After considering the comments and reviewing the statute, we conclude that the exemption of NCE applicants from our general mandatory auction authority does not prohibit us from auctioning non-reserved channels, even when NCE entities apply for those channels. Section 309(j) contains conflicting statutory directives. On the one hand, it directs the Commission to grant licenses and permits by a system of competitive bidding when mutually exclusive applications are filed, and to design a system of competitive bidding that recovers for the public "a portion of the value of the public spectrum resource made available for commercial use. . . . "[76] On the other hand, it exempts from competitive bidding licenses or construction permits issued by the Commission "for stations described in section 397(6) of the Act."[77] These provisions do not conflict with respect to the allocation of reserved channels or with respect to the allocation of non-reserved channels for which only commercial applicants apply. In the first instance, an auction is prohibited, while in the second it is mandated. But neither the statute nor the Conference Report provide us with any guidance on how we should award authorizations when NCE applicants file mutually

[76] 47 U.S.C. § 309(j)(1) and (j)(3)(C).

[77] 47 U.S.C. § 309(j)(2)(C).

exclusive applications for channels that are made available for commercia use.[78] Since Congress has not "directly spoken to the precise question at issue,"[79] we construe Section 309(j) in the manner that we believe best reconciles

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[78] We acknowledge that H.R. 2015, which was later amended in the Conference Committee and adopted as the Balanced Budget Act of 1997, initially had an exemption for "public telecommunications services, as defined in section 397(14) of the Communications Act of 1934 (47 U.S.C. 397(14)), when the license application is for channels reserved for noncommercial use." *See* H.R. Rep. 105-149, 105th Cong., 1st Sess., Section 3301(a)(1)(A) (1997). National Public Radio argues that the fact that the Conference Committee did not adopt the clause limiting the exemption to reserved channels reflects an intent that the exemption extend to non-reserved as well as reserved channels. Comments of National Public Radio at 32. While we are mindful of the canon of statutory construction relied upon by National Public Radio, we do not find it decisive in this instance because the exemption that was originally proposed in the House bill was quite different from the exemption that was ultimately adopted. As is apparent from the exemption quoted above, the House bill incorporated by reference the definition of "public telecommunications services," as defined in section 397(14) of the Act, while the exemption that was enacted as part of Section 309(j) incorporates by reference the definition of "noncommercial educational broadcast station" and "public broadcast station" set forth in Section 397(6) of the Act. *See* 47 U.S.C. § 397(6). Since the Commission does not license "public telecommunications services," that term does not seem an appropriate term to use in the Section 309(j) exemption, and the House may have added the reference to reserved channels in an attempt to tie the definition of "public telecommunications services" to the Commission's licensing authority. When the Conference Committee completely changed the wording of the exemption to rely on the more appropriate definition in Section 397(6), it may have found it unnecessary to add the additional clause because the Commission does license noncommercial educational broadcast stations, so the link between the exemption and the Commission's licensing authority is apparent. Thus, under these circumstances, we do not believe that the deletion of the clause in question reflects a Congressional intent to expand the exemption to channels made available for commercial use.

[79] *See Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

its conflicting directives: to exempt NCE applicants for reserved channels from auctions, and to auction all channels made available for commercial use, even if NCE entities choose to apply for those channels.

107. Section 309(j)(3) of the Act provides that "in identifying classes of licenses and permits to be issued by competitive bidding . . . and in designing the methodologies, . . . the Commission shall include safeguards to protect the public interest in the use of the spectrum." 47 U.S.C. § 309(j)(3).[80] One of the enumerated public interest objectives included in this section of the statute is "recovery for the public of a portion of the value of the public resource *made available for commercial use* and avoidance of unjust enrichment through the methods employed to award uses of that resource." 47 U.S.C. §309(j)(3)(C) (*emphasis added*). This provision makes it clear that the Commission is charged with designing competitive procedures that recover the value of spectrum made "*available*" for commercial use, regardless of who applies for it. A reading of 47 U.S.C. § 309(j)(2)(C) which permits NCE applicants to exercise "a right of first refusal" over commercial spectrum otherwise subject to auction would severely limit, if not defeat, our ability to meet this objective when an NCE entity applies for a non-reserved channel. It is an elementary canon of statutory construction that a statute should be interpreted so as not to render one part inoperative. *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985).

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[80] This is pre-existing auctions language that Congress, in the Balanced Budget Act, left unchanged.

108. As commenters note, the decision to operate non-commercially on the non-reserved channels is a voluntary choice on the part of the applicant, not a Commission requirement. Furthermore, it is a choice that is easily undone from a regulatory standpoint. If an applicant asks the Commission to designate its non-reserved permit or license as noncommercial educational, we will generally do so, provided that the applicant demonstrates NCE eligibility and consents to operate the non-reserved channel station in a noncommercial educational manner. If the station determines at any time that it wishes to operate commercially, however, it can simply file FCC Form 302, to voluntarily change the nature of its station and its regulatory status back to commercial again. Similarly, if one of these non-reserved channel stations is sold to another party, the new party can elect whether the station will be operated on a commercial or noncommercial basis.[81] Even an applicant indicating in its initial application that it wants to be licensed as noncommercial could amend that application at any time to propose commercial operations. In this manner, stations operating on non-reserved channels differ greatly from those operating on reserved NCE channels, which are not made available for commercial use. Noncommercial educational operation is mandated and permanent on the reserved channels, not voluntary and temporary as on the non-reserved channels.

109. Given the relative ease with which broadcasters choosing to operate on commercially available channels can both obtain and discard "NCE" status, we cannot conclude that Congress intended to limit the "recovery for

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[81] *See WNYC Communications Group*, 11 FCC Rcd 13841, 13843 (Mass Media Bur. 1996).

the public of a portion of the value of the [spectrum] . . . available for commercial use" to the proceeds from the auction of only those frequencies that NCE applicants do not want. Such a broad interpretation of Section 309(j)(2)(C) would seem to contravene apparent congressional intent to limit the situations in which licenses are awarded by comparative hearings, as reflected in our expanded auction authority. Interpretation of the language in such a manner would also create a statutory conundrum. Except for a select group of applications filed before July 1, 1997, the Commission is *required* to use auctions to award commercial broadcast licenses, when mutually exclusive applications are filed. Auctions would be *precluded*, however, under a broad reading of Section 309(j)(2)(C) whenever any one of the competing applicants for a station in the non-reserved band is a noncommercial educational entity. How the Commission is to resolve this dilemma is not spelled out in the statute or in the legislative history. If Congress had intended to exempt from our auction authority all licenses for noncommercial stations (whether authorized on the reserved or on the non-reserved channels), we believe that it would have done so explicitly, and that it would have also prescribed procedures for the Commission to follow when both commercial and noncommercial entities file applications for a non-reserved channel. But Congress did neither. This reinforces our conclusion that, consistent with our expanded auction authority generally and the public interest objectives enumerated in Section 309(j)(3)(C), Congress intended the exemption specified in Section 309(j)(2)(C) to apply only on the reserved band. We thus consider Section 309(j)(2)(C) of the statute as a direction that the Commission identify NCE stations as exempt from auctions for reserved noncommercial channels but not for non-reserved

channels that are also available to commercial broadcasters.

110. Our interpretation of the statute in the manner described reaches a result consistent with our decision in a case in which we interpreted a similar public safety exception from mandatory competitive bidding. *See Order on Reconsideration of the Second Report and Order, Automatic Vehicle Monitoring Systems*, PR Docket No. 93-61, 14 FCC Rcd 1339 (1999) (interpreting 47 U.S.C. §309(j)(2)(A)). We determined there that the applicant's voluntary intention to use a channel for public safety purposes did not bring the applicant under the auction exception, when that channel could also be used commercially. That case involved a wireless service called the Location and Monitoring Service (LMS), which is used for automatic vehicle monitoring. Like the dual use non-reserved broadcast channels at issue here, the LMS service can be used for a variety of purposes, some of which are related to public safety, and others of which are commercial. An applicant who intended to use an LMS frequency to locate emergency vehicles such as ambulances and police cars maintained that the statute prohibited the Commission from auctioning the right to use an LMS channel any time that an applicant proposed to use the channel for public safety purposes. We rejected this argument, stating that we must look beyond a particular applicant's intended use of the channel, to how the channels are allocated. *Automatic Vehicle Monitoring*, 14 FCC Rcd at 1343. Because the LMS was not allocated by the Commission as a public safety service, we found that the exemption from mandatory auction did not apply. Similarly, non-reserved channels are not allocated solely for noncommercial educational stations, and the nature of the

allocation determines whether they are subject to competitive bidding.[82]

111. We thus conclude that applications to construct noncommercial educational stations are exempt from auctions if the proposed station will operate on a channel that is reserved for NCE use. Mutually exclusive applications for new broadcast stations on channels available for commercial use, *i.e.* stations whose commercial or noncommercial nature can be changed voluntarily at the applicant's option, will be auctioned regardless of whether one or more of the applicants is eligible to use reserved channels. Such auctions will, in general, be conducted using our newly established auction rules.

2. Reserving Additional Spectrum for NCE Use

112. To mitigate any potential hardship that the auction process might impose on noncommercial entities, we discussed in the *Further Notice* the possibility of facilitating the reservation process. Currently, NCE applicants can file a Petition for Rule Making requesting a reallocation of a channel from non-reserved to reserved only if they demonstrate that they are precluded from using reserved channels due to such channels' receipt of interference from TV Channel 6 or foreign stations. The *Further Notice*

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[82] We observe that the facts of the LMS case are not identical to the current situation. For example, the LMS applicant did not raise its public safety argument until the reconsideration stage of a rule making, after the LMS service had been found auctionable, whereas the current NCE question was raised in a more timely manner. Nevertheless, the Commission in that case addressed a similar question involving a related section of the statute.

suggested that we also allow spectrum to be reallocated for NCE use if (a) the NCE entities would be precluded from serving their proposed communities of license using reserved channels by existing reserved channel stations or pending applications; and (b) the proposed allotment would provide the first or second NCE aural or video service received in the community. We asked whether such a reallocation would be sufficient to meet the public's need for NCE service. Pensacola Christian College proposes that we allow reallocation if there is no reserved channel available and no interference to other stations. Faith Broadcasting and Houston Christian Broadcasting suggest that the channel be reallocated if no reserved channels are available that would allow an NCE station to serve the community to which a non-reserved channel is assigned, with a 70 dbu service contour. Minnesota Public Radio proposes that the Commission make TV Channel 6 available to NCE stations when these stations move to digital channels.

113. However, several commenters object to a relaxed reservation approach. Elgin FM, a commercial broadcaster, states that additional NCE reservations are not fair to commercial broadcasters that are also competing for scarce spectrum. The University of Arizona says that although reserving additional spectrum at the allocations stage is a good idea for future applications, it does not address applications already on file. According to the University of Arizona, some pending applications are seeking the last frequencies available in an area, so a future ability to reserve another frequency will not help. To address this situation, it suggests a needs test that would apply to pending proceedings, based on the number

of existing NCE stations in relation to commercial stations.[83]

(a) Future NCE Allocations (non-reserved channels)

114. Upon consideration of the comments, we have decided, for future FM and television applicants, to expand opportunities to allocate channels from non-reserved to reserved. In addition to considering TV channel 6 (radio only) and foreign station interference (radio only), we will also adopt a needs test for future rule making requests which ask that non-reserved channels not already in the Table of Allotments be added and reserved for NCE use. For these future allocations requests, an NCE entity can show that the need for an NCE station is greater than the need for a commercial station. An NCE proponent could so demonstrate by showing that:

> (A) the NCE radio proponent is technically precluded from using the reserved band by existing stations or previously filed applications or an NCE television proponent shows that there is no reserved channel assigned to the community; *and*
>
> (B) the NCE proponent would provide a first or second radio or television NCE service to 10% of

[83] University of Arizona, et al., suggests a five pronged tests [sic] for determining whether NCE needs exceed commercial needs. NCE needs would be demonstrated by (1) first or second service; (2) ratio of NCE radio to commercial radio less than 20%; (3) ratio of NCE television to commercial television less than 33%, (4) technical reasons for lack of radio coverage, e.g. TV channel 6 and terrain obstructions; and (5) technical reason for lack of television coverage in top 100 TV markets. *Comments of University of Arizona, et al.* at 9-10.

> the population within the proposed allocation's 60 dBu (1 mV/m) service contour (radio) or Grade B contour (TV).[84] New NCE service to fewer than 2,000 people would be considered insignificant for purposes of this determination.

While we recognize that commercial broadcast applicants may also have limited spectrum available to them, we nevertheless believe that NCE applicants should have the opportunity to rebalance the commercial/noncommercial channel mix of FM and TV channels if they can demonstrate that there is a greater need for noncommercial service in an area. We adopt a limited expansion of existing policy today, and can evaluate the sufficiency of this limited change in the future if necessary.[85] We will not, however, apply this analysis to AM channels. AM is a mature service, already quite crowded, and in which little spectrum is available. No AM stations are reserved for NCE use. The Commission's creation of an AM expanded band, to which some existing commercial stations will migrate, will relieve, but not eliminate, existing AM interference issues. Thus, we do not anticipate establishing reserved NCE stations on the AM band.

115. If an NCE applicant demonstrates a greater need for NCE service than for commercial service under this

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[84] We assume that there would likely already be a first or second commercial service received in the area. In the unlikely event of an NCE applicant seeking reservation of nonreserved spectrum in an area not already served by two commercial channels, we delegate to the staff to consider on a case-by-case basis, whether commercial or NCE service is most needed.

[85] Thus, we will not adopt at this time more expansive changes to our policies, such as establishing set ratios of noncommercial stations, as the University of Arizona suggests.

test, the channel will be allocated as reserved, and only NCE applicants could apply to use the channel in the next application filing window. NCE applicants would then compete for the channel pursuant to the point system described above. The NCE station permit awarded would be for NCE use only, and could not be voluntarily switched to a commercial station by later application. If a greater need for NCE service is not demonstrated, however, and a channel thus remains available for commercial use, we would conduct an auction among the applicants and NCE applicants would be eligible to participate. As the prevailing applicant in such an auction would be awarded a permit for a commercial channel, the station could be programmed with either a commercial or noncommercial format. As under current practice, the permittee would have the option to voluntarily request that the station be licensed as NCE instead, as well as the option to voluntarily request a change back to commercial if it so desired. We will not establish bidding credits for NCE stations in such auctions, in view of the commercial nature of the non-reserved channels. We also note the lack of any supporting comments in response to the *Further Notice*'s discussion of NCE bidding credits. Those NCE applicants, as well as non-NCE applicants, that are eligible for our new entrant auction credit will, of course, be able to claim that credit. *See Competitive Bidding supra.*

3. Existing Applications

116. As indicated above, the University of Arizona is concerned that easier allocation of spectrum in the future will not help existing NCE applicants who already have filed applications to use commercially available channels. The University of Arizona suggests that we apply a needs

test to existing proceedings similar to that adopted for future proceedings. We have considered, but have decided not to adopt, this suggestion. We currently have approximately 250 applications in which commercial and noncommercial educational applicants are competing for approximately 45 channels which were commercially available at the time of application.[86] The nature of each such channel has been considered previously in a rule making proceeding and, after the opportunity for public comment, was identified as commercially available in the table of allotments in our rules. Both commercial entities and noncommercial entities that applied for those channels did so with full knowledge that their applications would be considered under commercial standards.

117. It is in accord with the original expectations of all applicants to require NCE applicants to "play by commercial rules" as anticipated, even if that means participating in auctions. Accordingly, as in the *Competitive Bidding* proceeding, existing applications for commercially available channels will be resolved by auction. We recognize that, due to funding concerns, many NCE applicants may be unable to participate or prevail in an auction. We would encourage such applicants to use the new needs test discussed above to initiate rule making proceedings to allocate other channels exclusively for NCE use.

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[86] As of March 2000 there were 39 radio proceedings affecting 220 applicants in which NCE applicants are competing with commercial applicants for non-reserved channels. (33 FM proceedings and 6 FM translator proceedings). In the same period, there were five television proceedings affecting 22 applicants in which NCE and commercial television entities were competing for non-reserved channels.

118. Applicants with pending applications for nonreserved channels may wish to settle prior to auction. Pursuant to our existing rules, settlement will be permitted provided that consideration does not exceed the settling applicant's reasonable and prudent expenses (including, for a commercial applicant, any fees paid to the Commission). A final date for settlement will be announced in a public notice, establishing auction dates. Applicants voluntarily dismissing their applications, for reasons other than settlement, may request a refund of fees from the Commission.

I. Conclusion

119. We will use a point system to select among competing applicants for reserved channels and will hold auctions to select among applicants for nonreserved channels. The nature of the channel (reserved or nonreserved) will govern, not the commercial or noncommercial nature of the individual applicants. We conclude that this method is consistent with the intent of the Balanced Budget Act, which exempted noncommercial educational stations from auction, while requiring auctions for commercial stations, and with other sections of the Communications Act, which require the Commission to recover the value of spectrum made available for commercial use. In recognition, however, of the possibility of a compelling need for NCE service in a particular area that may arise on a case-by-case basis, and the potential limited financial resources of NCE entities who may wish to serve such an area, we provide a new mechanism for noncommercial applicants to request allocation of additional (currently non-reserved) spectrum as reserved.

IV. Administrative Matters

A. Application Form

120. We intend to modify the Application to Construct a Noncommercial Educational Broadcast Station (FCC Form 340), to reflect the information required to apply a point system as well as the other changes adopted in this Report and Order. We direct the Mass Media Bureau to make the necessary modifications to the form to reflect these changes for future applications and to fashion a form or other method to receive information from pending applicants who filed on the existing form.

B. Filing Freeze

121. To facilitate a smooth transition from the A/B cutoff filing method to the window filing system, and transition from comparative hearings to point systems, we will implement a filing freeze on applications for new NCE TV, FM, and FM translator stations and for major changes to such existing NCE stations operating on reserved channels. From the release of this Report and Order we will only accept reserved channel NCE applications if they are filed in response to "A" cutoff notices that have already been issued and for which the deadline for filing "B" applications has not yet occurred. Other new and major change applications for reserved NCE channels must await the opening of an NCE filing window. Any applications filed before release of this Report and Order, for which "A" cutoff public notices have not yet issued, will be included in the first educational window opened for new applications in the relevant service. The filing freeze is limited to reserved NCE channels. There is a similar freeze in place on non-reserved channels, while the

Commission transitions to an auction environment for those channels. Should the staff lift the freeze on non-reserved channels prior to lifting the freeze on reserved channels, NCE applicants will have the option at that time to apply for non-reserved channels, subject to their participation in any auctions that may result consistent with the policies and regulations established herein.

V. PROCEDURAL MATTERS AND ORDERING CLAUSES

122. **Paperwork Reduction Act of 1995 Analysis.** This Report and Order contains either new or modified information collections. Therefore, the Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this Report and Order as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days from the date of publication of this Report and Order in the Federal Register. Comments should address: (a) whether the new or modified collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained

herein should be submitted to Judy Boley, Federal Communications Commission, Room 1C1804, 445 12th Street, S.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov and to Virginia Huth, OMB Desk Officer, 725 17th Street, N.W., Room 10236, NEOB, Washington, DC 20503 or via the Internet to: VHuth@omb.eop.gov.

123. For additional information concerning the information collections contained in this Report and Order contact Judy Boley at 202-418-0217.

124. **Final Regulatory Flexibility Analysis.** The Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq*, is attached as Appendix C.

125. Accordingly, IT IS ORDERED, that pursuant to the authority of Sections 4(i) and (j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), 309(l), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), 309(l), and 403, this Report and Order IS ADOPTED, and Parts 73 and 74 of the Commission's Rules ARE AMENDED as set forth in Appendix D below.

126. IT IS FURTHER ORDERED that, pursuant to the Contract with America Advancement Act of 1996, the rule amendments set forth in Appendix D SHALL BE EFFECTIVE 60 days following publication in the Federal Register.

127. IT IS FURTHER ORDERED that, effective upon release of this Report and Order and continuing until the opening of filing windows for NCE stations, the Commission shall not accept applications for new and major

changes to NCE stations on reserved channels, except for applications filed in response to previously announced A [sic] cutoff periods that have not yet closed.

128. IT IS FURTHER ORDERED, that pursuant to 47 U.S.C. § 155(c), the Chief of the Mass Media Bureau IS DELEGATED AUTHORITY to prescribe application format and day-to-day procedures concerning the filing and processing of applications in accordance with the guidelines set forth herein.

129. IT IS FURTHER ORDERED, that any traditional comparative hearing proceedings to which a noncommercial educational applicant is a party ARE HEREBY TERMINATED.

130. IT IS FURTHER ORDERED, that the Commission's Office of Legislative Affairs SHALL SEEK an amendment to the Communications Act, 47 U.S.C. § 155(c)(1) that would permit the Commission to delegate authority to conduct review of applications pursuant to a point system to the Chief, Mass Media Bureau.

131. IT IS FURTHER ORDERED, that until such time as 47 U.S.C. § 155(c)(1) is amended, the staff is directed to refer mutually exclusive NCE applications to the Commission to apply the point system procedures established herein to applications for broadcast construction permits.

132. IT IS FURTHER ORDERED, that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Memorandum Opinion and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

133. IT IS FURTHER ORDERED, that the new or modified information collection contained in this Report and Order are subject to approval by the Office of Management and Budget and will become effective 60 days after OMB approval, unless a notice is published in the Federal Register stating otherwise.

134. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

135. For additional information concerning this proceeding, contact Irene Bleiweiss, Mass Media Bureau, Audio Services Division, (202) 418-2780.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

STATEMENT OF COMMISSIONERS HAROLD FURCHTGOTT-ROTH AND GLORIA TRISTANI, DISSENTING IN PART

In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants – MM Docket No. 95-31

We would have found that Section 309(j)(2)(C) of the Communications Act precludes us from using competitive bidding to award a broadcast license to a noncommercial educational broadcast or public broadcast station to operate on a commercial channel. We believe that Congress' mandate is clear: the Commission lacks authority to employ auctions to issue licenses to such stations, regardless of whether they operate on a reserved or on a commercial

frequency. Since the statute is clear on its face, we are obligated to give it effect.[87]

The specific exemption to our competitive bidding authority in section 309(j)(2)(C) provides that such authority "shall not apply to licenses or construction permits issued by the Commission . . . for stations described in section 397(6) of this title." Section 397(6), in turn, defines the terms "noncommercial educational broadcast station" and "public broadcast station" as "a television or radio broadcast station which . . . under the rules and regulations of the Commission . . . is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association" or "is owned and operated by a municipality and which transmits only noncommercial programs for education purposes."

Nothing in section 309(j)(2)(C) limits its reach to licenses issued for noncommercial and public broadcast stations *on reserved channels*. The statute makes no distinction between licensees granted to section 397(6) stations to operate on reserved spectrum and licensees granted to such entities to operate on unreserved spectrum; the prohibition on the licensing of these stations pursuant to auctions is, in this regard, unqualified. The Commission simply has no competitive bidding authority when it comes to licenses issued for stations described in Section 397(6).

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[87] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Similarly, nothing in section 397(6) limits the definition of noncommercial educational and public broadcast stations to those operating on reserved channels. Rather, section 397(6) defines the stations exempt from auctions under section 309(j)(2)(C) in terms of the station's *eligibility* under Commission rules to be licensed as a noncommercial educational or public broadcast station. Commission rules do not require broadcast stations to operate only on reserved bands in order to be eligible for status as a noncommercial educational or public broadcast station.[88] To the contrary, our rules specifically address the situation in which noncommercial educational stations are licensed to operate on unreserved channels.[89]

Had Congress intended to limit the exemption for noncommercial educational and public broadcasters from competitive bidding to cases in which such broadcasters were applying for reserved frequencies, we believe that Congress would have done so explicitly. Indeed, prior versions of both the House and Senate bills expressly provided for an auction exemption limited to "channels reserved for noncommercial use," but those limitations were eliminated prior to passage.[90] Where Congress deletes limiting language from a bill prior to enactment, it may be presumed that the limitation was not intended.[91] We would not read this limitation back into the statute.

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[88] *See* 47 C.F.R. § 73.503.

[89] *See* 47 C.F.R. § 73.513.

[90] *See* H.R. 2015, 105th Cong., 1st Sess., § 3301(a)(1); S. 947, 105th Cong., 1st Sess., § 3001(a)(1).

[91] *See Russello v. United States*, 464 U.S. 16, 23-24 (1983).

The majority's reasoning to the contrary is unpersuasive. Although the majority tries to paint itself as caught between two "conflicting statutory directives," para. 106 (juxtaposing sections 309(j)(1) & (j)(3)(C) with section 309(j)(2)(C)), this characterization of section 309 is just not tenable. The statutory language is not in equilibrium, leaving the Commission free to choose one side or the other, but clearly weighs in favor of exempting NCEs from auctions across the board.

The directive in section 309(j)(1) to auction all mutually exclusive applications, on which the majority places such reliance, is by its clear terms subject to the exemptions set forth in the very next subsection. That subsection, of course, includes the exemption for noncommercial stations. *See* 309(j)(1) ("If . . . mutually exclusive applications are accepted for any initial license or construction permit, then, *except as provided in paragraph (2),* the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding. . . .). Section 309(j)(1) is simply not an order to auction all mutually exclusive applications, as the majority suggests, and cannot be relied upon as such. Furthermore, the directive in section 309(3)(C) is simply to "seek to promote" – not to accomplish at all costs, and surely not where inconsistent with the actual statutory scheme – recovery of the value of spectrum made available for commercial use.

On the other side of the scale, there is section 309(j)(2)(C), which follows immediately the mandate to auction mutually exclusive applications except in certain situations. It provides that one of those situations is where "licenses or construction permits [are] issued by the Commission for stations described in section 397(6) of the

Act." This exemption speaks *specifically* to the question of how to treat NCE applicants in a mutually-exclusive application situation. Accordingly, under the canon of construction that the specific governs the general, *see, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992), we think it should trump whatever directives one might find in sections 309(j)(1) and (2)(C). As explained above, however, section 309(j)(1) is not an absolute mandate to auction all commercial spectrum and the hortatory "seek to promote" language of section (j)(C)(3) must give way to the mandatory language of the statutory exemption for NCEs.

STATEMENT OF COMMISSIONER GLORIA TRISTANI, DISSENTING IN PART

In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants – MM Docket No. 95-31

While I generally support the point system adopted in the Order, I would have given an additional boost to stations that promised to provide a minimum level of locally-originated programming. Local-origination programming is one of the foundations on which the noncommercial educational service was built. As the Order notes, the 1967 Carnegie Report, which Congress relied upon to develop and improve noncommercial educational television stations, provided that:

> The heart of the system is to be the community . . . [T]he overwhelming proportion of programs will be produced in the stations . . . local skills and crafts will be utilized and tapped . . . Like a good metropolitan newspaper, the local station

> will reflect the entire nation and the world, while maintaining a firm grasp on the nature and needs of the people it serves.[92]

Congress and the Supreme Court have repeatedly endorsed the preservation of local-origination programming as a legitimate and substantial governmental interest. In its official findings underlying the 1992 Cable Act, Congress stated: "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial government interest in ensuring its continuation."[93] In *Turner*, the Supreme Court expressly cited this finding in rejecting the argument that Congress' "legitimate legislative goals" would be satisfied by the preservation of a truncated broadcasting industry providing a minimum level of service.[94] Similarly, in *Midwest Video*, the Court upheld an FCC requirement that cable operators make facilities available for local programming production as reasonably furthering the goal of "increasing the number of outlets for community self-expression."[95]

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[92] Carnegie Commission on Educational Television, *Public Television: A Program For Action* 87 (1967).

[93] *Cable Television Consumer Protection and Competition Act of 1992*, 102 P.L. 385 (1992) Sec. 2(a)(10).

[94] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997). *See also Chicago Cable Communications, et al. v. Chicago Cable Commission*, 879 F.2d 1540 (7th Cir. 1989).

[95] *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 (1972). *See also National Broadcasting Co. v. United States*, 319 U.S. 190, 203 (1943) ("A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest.").

In the Community Broadcasters Protection Act of 1999 ("CPBA"), Congress recently reaffirmed the value it places on local-origination programming. In the CPBA, Congress provided additional "Class A" protection to certain low-power television stations who have "operated their stations in a manner beneficial to the public good." One of the primary qualifications for Class A status is that the station must broadcast at least 3 hours a week of locally-produced programming. Similarly, in the Commission's recent Order on low power radio, it gave additional points to applicants who would air at least eight hours a day of local-origination programming.

The majority argues that the examples of Class A LPTV and LPFM are inapposite because they involve services that are highly localized, unlike full-service NCE stations that have broader goals and a wider signal range. In adopting the LPFM local program origination rule, however, the Commission expressly stated that "[t]his criterion derives from the service requirements *for full-service broadcast stations*, which are required to maintain the capacity to originate programming from their main studios."[96] Thus, awarding additional credit for local-origination was *not* based on the localized nature of the service, as the majority now asserts, but on the obligation of full-power stations to maintain the ability to produce local programming.

In sum, awarding additional points for local-origination programming would: (1) promote the purpose of the noncommercial educational service; (2) advance

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[96] *Report and Order*, MM Docket 99-25, para. 144 (rel. January 27, 2000) (emphasis added).

Congress' goal of preserving local origination programming; and (3) pass muster in court. The majority's argument against adoption is specious. I therefore dissent.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1310 **September Term, 2003**

American Family Association, Inc.,
Petitioner

v.

Federal Communications Commission and United States of America,
Respondents

National Public Radio, Inc. and Association of Public Television Stations,
Intervenors

Consolidated with 00-1479, 01-1222

BEFORE: Sentelle, Henderson, and Tatel, Circuit Judges

ORDER

(Filed July 20, 2004)

Upon consideration of petitioner American Family Association's petition for rehearing filed June 25, 2004, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Nancy G. Dunn
Nancy G. Dunn
Deputy Clerk

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

NATIONAL PUBLIC RADIO, INC., et al., Petitioners, **v.** **FEDERAL COMMUNICATIONS COMMISSION** and **UNITED STATES OF AMERICA,** Respondents	**CASE NO. 00-1246**
STATE OF OREGON, acting by and through State Board of Higher Education for the Benefit of Southern Oregon University, Petitioner **v.** **FEDERAL COMMUNICATIONS COMMISSION** and **UNITED STATES OF AMERICA.** Respondents	**CASE NO. 00-1255**
AMERICAN FAMILY ASSOCIATION, INC., Petitioner **v.** **FEDERAL COMMUNICATIONS COMMISSION** and **UNITED STATES OF AMERICA,** Respondents.	**CASE NO. 00-1310**

AMERICAN FAMILY ASSOCIATION, INC.'S FIRST AMENDED PETITION FOR REVIEW (VERIFIED)

I. PRELIMINARY STATEMENT

1. This is a petition for review of an order of the Federal Communications Commission adopting comparative standards to select between competing noncommercial educational applicants. Petitioner challenges the constitutionality of the new standards set forth in a Report and Order published June 8, 2000. *Report and Order*, FCC 00-120 (2000), attached hereto as Exhibit 1 ("Report and Order"); *see also* 65 Fed. Reg. 36,375 (2000).

2. The new standards become effective August 7, 2000, 65 Fed. Reg. 36,375. The standards violate Petitioner's free speech, free press and free exercise rights guaranteed by the First Amendment, as well as its rights to equal protection guaranteed by the Fifth Amendment. The standards also unconstitutionally favor government funded networks such as NPR while subjecting similarly situated religious networks to burdensome and unequal limitations such that Petitioner and other religious networks will lose to government funded networks virtually every time. Due to the immediacy of the harm occasioned by the impending implementation of the new standards, Petitioner seeks preliminary injunctive relief as well as permanent injunctive relief against enforcement of the new standards, as well as a declaration that the new standards are unconstitutional on their face.

II. JURISDICTION

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 2344, which confers original jurisdiction on federal circuit courts in suits by any party aggrieved by a final order of a federal agency.

III. VENUE

4. Venue is proper in this district pursuant to 28 U.S.C. § 2343.

IV. IDENTIFICATION OF PARTIES

5. Petitioner, American Family Association, Inc. ("AFA"), is a Mississippi not for profit corporation headquartered in Tupelo, Mississippi, and is capable of suing and being sued.

6. Respondent, Federal Communications Commission ("FCC" or "Commission"), is an agency of the United States existing under the laws of the United States and is a corporate entity capable of suing and being sued.

V. STATEMENT OF FACTS

7. AFA, through its radio network, American Family Radio ("AFR"), owns and operates over 175 noncommercial educational FM ("NCE FM") radio stations and/or translators located predominantly in rural areas throughout the country. Specifically, AFR holds licenses for 74 primary NCE FM stations together with 107 translator stations. In order to protect its existing translators, AFR has applied for primary licenses, for 39 of which competing applications have been filed by other applicants. AFR also has its

own news department, furnishing daily reports on breaking news nationwide from a Christian perspective.

8. From its inception in 1938 until 1977, the FCC by its own admission practiced "invidious discrimination" against religious organizations, totally barring them from holding NCE FM licenses, unless the Commission decided that their educational purposes were "primarily secular." *The Moody Bible Institute of Chicago*, 66 FCC 2d 162 (1977) (Chairman Wiley concurring).

9. For the next fifteen (15) years, from 1978 to 1993, the FCC selected NCE FM licensees using criteria that the Commission later admitted were "vague", "meaningless" and "subjective," and which made rational choices between applicants "difficult, if not impossible." *Notice of Proposed Rulemaking*, MM Docket No. 95-31 (March 17, 1995); *see also* Report and Order at ¶¶ 1, 5 (quoting *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Red 2577, 2580 n.8 (Rev. Bd. 1991)).

10. On December 15, 1999, the FCC issued "additional guidance" for use in evaluating programming broadcast by religious organizations on NCE channels. *WQED Pittsburgh and Cornerstone Television, Inc.*, 19 CR 214 (1999). The FCC stated that "programming primarily devoted to religious exhortation, proselytizing, or statements of personally-held religious views and beliefs generally would not qualify" as educational programming. *Id.* at ¶ 44. The FCC further stated that "church services generally will not qualify as 'general educational' [programming] under our rules." *Id.* at n.81. Although the FCC subsequently withdrew the additional guidance in response to overwhelming public and congressional protests, it did not disavow the views concerning religious

programming expressed therein. As Commissioner Tristani asserted in the *Order on Reconsideration*, "I, for one, will continue to cast my vote in accordance with the views expressed in the additional guidance." *Order on Reconsideration*, 19 CR 241 (2000).

11. The FCC's "additional guidance" was found by the United States House of Representatives to constitute the imposition of "content-based programming requirements" contrary to the First Amendment rights of religious broadcasters. *See* H.R. 4201, 106th Cong., 2d Sess., 146 Cong. Rec. H 4682 (2000). The House therefore passed a bill amending the Communications Act of 1934 to prohibit the commission from treating religious programming as not serving an educational, instructional, or cultural purpose. *Id.*[1]

12. For the last six (6) years, from 1994 to 2000, mutually exclusive NCE FM applications have piled up unresolved because the FCC had no criteria for comparing applicants. The new standards will affect the issuance of some thirty (30) new NCE television licenses and approximately 615 NCE FM broadcast licenses currently subject to mutually exclusive applications.

13. On or about April 4, 2000, with full knowledge of the characteristics of existing mutually exclusive applications filed by all applicants and the type of programming the applicants intend to air, the FCC issued its Report and Order. In the Report and Order, the FCC announced new guidelines governing NCE channels for which mutually exclusive applications are filed.

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[1] A companion bill is currently pending in the Senate.

14. Largely as a result of the past systematic discrimination against religious organizations, government funded network stations occupied most of the major markets in the United States before the FCC allowed religious organizations to hold NCE licenses. Of the 2066 NCE FM stations in the United States, some 600 are NPR affiliates funded by the government's Corporation for Public Broadcasting ("CPB"), and 560 are Public Radio International affiliates, also obtaining funding from CPB. These government-funded networks saturate the nation, reaching, by their own estimate, 91% of all Americans.[2] Of course, "organizations with religious affiliations are not eligible to apply for government funding." Report and Order at ¶ 67. Among religious networks, AFT has the most stations, yet reaches a mere 3.8% of the population.

A. The New Standards

15. The new standards employ a point system to select among competing applications for full-service NCE stations (radio or television) on reserved channels. *Id.* at ¶ 2. On non-reserved channels, however, the FCC will use auctions to select among competing applicants, even if they are NCE applicants, because" the use of auctions . . . best reconciles conflicting directives in the statute." *Id.*

16. Under the new standards, points are awarded for local diversity, technical superiority, localism and statewide educational networks. *Id.* at ¶ 3. The applicant with the most points is awarded the permit. *Id.* An applicant

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[2] Upon information and belief, there is also a PBS affiliated television station located in all but one of the top 100 Nielsen rated markets in the country.

can score two points either for ownership diversity or for participation in a statewide educational network; two points for technical superiority; and three points for localism. *Id.*

17. In case of a tie, the one with fewer stations wins, or if they have an equal number of stations, the applicant with fewer pending applications wins. *Id.*

1. Attribution Standards

18. The new standards also set forth attribution standards for noncommercial applicants to identify the indirect control a party who provides funding and programming may exert over a licensee. Previously, the FCC had applied attribution standards only to commercial broadcast applicants, for whom ownership limits exist. There are no ownership limits on noncommercial educational stations. The new attribution standards effectively limit the ability of religious networks to build new NCE stations.

19. Under the new attribution standards, the interests of entities "providing more than 33% of equity and/or debt, and (1) who supply more than 15% of the station's weekly programming or (2) who have attributable interests in media in the same market" will be attributed to the applicant. *Id.* at ¶ 79.

20. Under the standards financial and programming relationships between religious networks and local station sponsors will result in attribution of control, effectively penalizing the applicants. However, financial and programming relationships between government funded entities such as the Corporation for Public Broadcasting

("CPB") and National Public Radio ("NPR") and local station sponsors will not result in attribution of control.

21. In the Report and Order, the FCC asserted that these new attribution standards were "consistent with the attribution standards applied to commercial broadcasters." *Id.* In truth, however, these attribution standards differ in a critical way: The attribution standards applicable to *commercial* broadcasters emphasize actual control; control of all network licenses is attributed to the entity supplying the money and programming (normally the network). *See* 47 U.S.C. § 73.3555. Under the new standards applicable to *NCEs*, by contrast, control of all network licenses is attributed *not* to the network providing money and programming, but to the *local licensee*. This "standard" is wholly irrational, and can be understood only by examining its effect on NPR affiliates.

22. Government funded networks such as NPR do not hold licenses, and so fall outside the scope of the new attribution standards, even though they supply the lion's share of programming and the government supplies most of the funding through CPB. By contrast, religious networks customarily supply funding and programming, and hold the licenses as well. Religious networks are therefore penalized under the attribution standards, while NPR affiliates are not.

23. The FCC explained in the Report and Order that the new attribution standards "should not have any impact on traditional NCE funding and programming relationships, because traditional sources of NCE funding (*such as the Corporation for Public Broadcasting*, financial institutions, and major donors) and of NCE programming, (*such as the Public Broadcasting Service*) are not generally

broadcast licensees and thus will have no broadcast interests to attribute." *Id.* at ¶ 79 (emphasis added).

24. It has been the practice of certain networks to simply file a mutually exclusive application wherever AFR files an application, thus effectively barring AFR from obtaining new permits during the last six years during which the Commission has not processed mutually exclusive applications. Accordingly, AFR enlisted the assistance of small corporations that had no licenses and were not known to these other networks as AFR-related entities in filing for new permits. AFR promised these corporations that it would fund the construction of their stations in exchange for a promise to air AFR programming.

25. AFR fully disclosed to the Commission this mechanism for overcoming parasitical mutually exclusive applications in September of 1999. The new attribution standards appear calculated to sweep within them such financing arrangements as AFR has made with these small corporations. Indeed, in paragraph 79 of the Report and Order, the Commission makes reference to just such arrangements, albeit without mentioning AFR by name. *Id.* ("We are already receiving applications for NCE stations, disclosing that, pursuant to an agreement between the applicant and an existing broadcast licensee, the existing licensee will finance construction of the new station in exchange for a commitment to air a majority of that licensee's programming.").

26. Under the new attribution standards, AFR's arrangements with the small corporations is rendered useless, because the corporations are treated as AFR entities and thus penalized under the point system.

2. The Point System

27. Under the new standards, two (2) points may be awarded for "local diversity," that is, where there is no overlap between the principal community contour of the proposed station and the contour of any other commonly controlled broadcast station. *Id.* at ¶ 29.

28. Because the points for local diversity might "disadvantage" state-wide educational networks, the FCC has determined that a school system can receive an equal credit for participation in or operation of a state-wide network. In order to qualify as a state-wide network the school system must be an accredited institution of higher learning with at least five (5) full time campuses within a single state, or have at least fifty (50) accredited full-time elementary and/or secondary schools within a state that operate under common authority. *Id.* at ¶ 58. Upon information and belief, with only one exception, only government schools meet this high standard.

29. Through use of the state-wide educational network credit, government funded networks such as NPR can offset the local diversity points garnered by religious networks.

30. The requirement that an entity have at least five (5) full time campuses within a state effectively limits the state-wide network credit to government universities, because almost no private universities have full time campuses in a single state. Government universities routinely air NPR programming.[3] Therefore, the state-wide

[3] Universities are also quintessentially cosmopolitan, priding themselves on their diverse student bodies. Accordingly, they serve

(Continued on following page)

network credit operates almost exclusively in favor of government funded networks such as NPR.

31. After discussing the numerical limitation for state-wide networks in the new standards and struggling with the decision whether to limit the credit to government supported networks only or not, the Commission determined to place the number at five. *Id.* at ¶¶ 56-58. They did so in order to allow a single private institution that had five campuses to qualify for the state-wide educational network credit. In so deciding, the Commission reasoned that the private institution in question "was reasonable in believing that broadcast service to five such campuses *was similar to a state government's network.*" *Id.* at ¶ 58 n.42 (emphasis added).

3. Localism

32. The most determinative factor in the new point system is localism, which receives three (3) points of a possible total of only six (6) or seven (7). This credit accrues to "a local applicant whose educational goals are limited to a specific geographical region." *Id.* at ¶ 41. The Commission noted that the localism credit would benefit government funded networks such as NPR, *id.* at ¶ 47, but rejected out of hand the notion that it would adversely impact religious networks. *Id.* at ¶ 50.

33. As defined in the standards, however, the localism credit does indeed adversely impact religious networks. As shown above in ¶¶ 21-23, religious networks

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almost no truly "local" interests in choosing programming for their NCE stations.

will generally not qualify for localism credit and government funded network stations will.

34. Under the new standards, then, stations that air national programs non-religious in nature such as NPR's are deemed "local," but stations that air national programs religious in nature are not. Therefore, whenever a station airing government funded programs such as NPR has a mutually exclusive application against a religious network, the government funded network will win the localism points and thus be awarded the license.

35. The rationale offered by the Commission to undergird this heavy weighting in favor of "localism" is as follows: "we found local entities preferable from a public interest perspective because local entities have more expertise and accountability when it comes to serving the educational needs of the local community." *Id.* at ¶ 46 (citing *Second Report and Order, ITFS*, 101 fcc 2d 49 (1985)).

36. The Commission noted further that "most public broadcasters *funded by CPB* are local." *Id.* at ¶ 47 (emphasis added). They cited the comments of NPR and CPB for data indicating that "[o]n average, local programming constituted 50% of public radio stations' weekly broadcasts," and that "95% of all public television stations *receiving CPB grants* reported providing instructional programming to elementary school and 79% providing instructional programming to secondary schools during that time period." *Id.* (emphasis added). The Commission thus adopted the "localism" credit with full knowledge that it would inordinately favor government funded networks over religious networks, and that such government funded networks are in actual practice no more "local" than

religious networks. The label of "localism" is thus a simple ruse for favoring one type of national network over another.

37. The Commission proclaimed that the localism credit is reserved for "truly local" applicants, since, after all, "education historically is a local undertaking." *Id.* at ¶ 49. In fact, so important to the Commission's determination was the notion that education is a local undertaking that they repeated that mantra three different times. *See id.* at ¶¶ 46, 49 and 51.

38. Despite the appeal to locally produced programs. *id.* at ¶ 44, and local accountability, the localism credit as adopted by the Commission operates in favor of national government funded networks such as NPR and to the detriment of religious networks such as AFR. The preference under the standards for NPR affiliates in derogation of the rights of AFR serves no rational purpose, but instead, especially in the context of news casts, serves to destroy diversity in method, manner and emphasis of presentation and ensure uniformity of views. The concentration of control of the airwaves in the hands of NPR affiliates is virtually a *fait accompli*.

Tie Breakers

39. The Commission adopted a primary and a secondary tie breaker in the event competing applicants received an equal number of points under the new system. The primary tie breaker awards the permit to the applicant with the fewest existing station authorizations, i.e. licenses and construction permits. The secondary tie breaker awards the permit to the applicant with the

fewest pending new and major change applications in the same service at the time of filing. *Id.* at ¶¶ 72-73.

40. Under the new standards, AFR would lose virtually every one of its approximately 118 mutually exclusive applications, including the 39 filed simply to protect its existing translators. Because it is a national religious network owning the licenses, it will never qualify for the most determinative factor, localism. Thus, in almost all cases, the best it can hope for is a tie. However, under the tie breaker rules, AFR again almost always loses, because it has more stations than anyone else.[4]

VI. ALLEGATIONS OF LAW

41. All of the acts of Respondent FCC, its officers, agents, servants, and employees, as alleged herein, were conducted under the color and pretense of the statutes, policies, regulations and customs and usages of the United States.

42. As a result of the FCC's actions set forth above, Petitioner has suffered irreparable injury to its constitutional rights.

VII. FIRST CAUSE OF ACTION (Equal Protection)

43. Paragraphs 1-42 above are incorporated herein by reference, the same as though pleaded in full.

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[4] In view of the systemic discrimination against religious broadcasters, and the imminent harm to Petitioner's constitutional rights, Petitioner believes that seeking reconsideration of the Report and Order from the FCC would be futile.

44. The FCC's preference of government funded networks such as NPR, coupled with its penalizing of religious broadcast networks such as AFR, is an unconstitutional abridgement of Petitioner's right to equal protection of the law as secured by the Due Process clause of the Fifth Amendment to the United States Constitution.

WHEREFORE, Petitioner prays for relief against Respondent as hereinafter set forth in the prayer for relief.

VIII. SECOND CAUSE OF ACTION (First Amendment)

45. Paragraphs 1-42 above are incorporated herein by reference, the same as though pleaded in full.

46. Respondent's new standards constitute impermissible content-based discrimination against religious broadcasters, thereby infringing their rights to free speech and free press.

47. There is no compelling governmental interest sufficient to justify the FCC's content-based discrimination against religious broadcasters.

48. In the alternative, the new standards are arbitrary and capricious.

WHEREFORE, Petitioner prays for relief against Respondent as hereinafter set forth in the prayer for relief.

IX. THIRD CAUSE OF ACTION (Viewpoint Discrimination)

49. Paragraphs 1-42 above are incorporated herein by reference, the same as though pleaded in full.

50. The FCC's new standards constitute impermissible viewpoint discrimination against religious broadcast networks generally and AFR specifically.

51. The new standards prefer government funded networks such as NPR, while simultaneously deterring and penalizing religious broadcast networks, such as the AFR.

52. The new standards thereby impermissibly countenance monopolization of the NCE market by government funded networks.

WHEREFORE, Petitioner prays for relief against Respondent as hereinafter set forth in the prayer for relief.

X. FOURTH CAUSE OF ACTION (Free Exercise – Hybrid)

53. Paragraphs 1-42 above are incorporated herein by reference, the same as though pleaded in full.

54. The object or effect of the new standards is to infringe upon and restrict expressive activities because of their religious motivation and content, in violation of Petitioner's rights to the free exercise of religion as well as of free speech and free press, as secured by the First and Fifth Amendments to the United States Constitution.

55. Respondent's new standards do not serve a compelling interest.

56. There exist less restrictive means to accomplish any compelling interest Respondent may have.

57. In the alternative, the new standards are arbitrary and capricious.

WHEREFORE, Petitioner prays for relief against Respondent as hereinafter set forth in the prayer for relief.

XI. FIFTH CAUSE OF ACTION (Administrative Procedures Act)

58. Paragraphs 1-42 above are incorporated herein by reference, the same as though pleaded in full.

59. Respondent's new standards violate the Administrative Procedures Act, 5 U.S.C. §706(2), because they are arbitrary and capricious, and they are contrary to constitutional rights for the reasons set forth above.

WHEREFORE, Petitioner prays for relief against Respondent as hereinafter set forth in the prayer for relief.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully prays that the Court:

a. Assume jurisdiction over this action;

b. Declare that Respondent's new comparative standards are unconstitutional on their face for the reasons set forth above, or, in the alternative, declare the standards violative of the Administrative Procedures Act;

c. Enter a Judgment and Decree declaring that Respondent's new standards are an unconstitutional violation of Petitioner's rights of free speech, free press and free exercise of religion as guaranteed by the First Amendment to the Constitution of the United States, as well as Petitioner's rights to equal protection under the

law as guaranteed by the Due Process clause of the Fifth Amendment.

d. Grant a preliminary and permanent injunction prohibiting Respondent from enforcing the new comparative standards;

e. Award Petitioner its reasonable costs and attorneys' fees, pursuant to 28 U.S.C. § 2412; and

f. Grant such other and further relief as this Court deems necessary and proper.

Respectfully submitted,

/s/ Stephen M. Crampton

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*Pending approval of applications for admission filed, on information and belief, July 13, 2000.

VERIFICATION

I, Donald E. Wildmon, a citizen of the United States and a resident of Tupelo, Mississippi, hereby declare under penalty of perjury that I have read the foregoing First Amended Petition for Review (Verified) and the factual allegations therein, and that the facts alleged therein are true and correct, unless stated to be upon

information and belief, in which case they are true to the best of my knowledge, information and belief.

Dated: July 27, 2000

/s/ Donald E. Wildmon
DONALD E. WILDMON

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FAMILY ASSOCIATION, INC.,	:	
Petitioner,	:	**CASE NOS. 00-1310**
v.	:	**00-1246**
FEDERAL COMMUNICATIONS COMMISSION,	:	**00-1255**
Respondent.	:	

AMERICAN FAMILY ASSOCIATION'S MOTION FOR SUMMARY DISPOSITION

Petitioner American Family Association, Inc. ("AFA"), by and through counsel, moves this Court pursuant to Fed. R. App. P. 27(a) and Cir. R. 27(g) for an order granting summary disposition of this matter in its favor and declaring the FCC's new comparative standards to select between competing noncommercial educational applicants unconstitutional. As grounds, AFA states that the new standards constitute religious gerrymandering, according government-funded networks such as National Public Radio ("NPR") preferential treatment and status while subjecting similarly situated religious networks such as AFA to burdensome and unequal limitations such that Petitioner and other religious networks will lose to government funded networks every time. Alternatively, and for the same reasons, the new standards violate the Administrative Procedures Act because they are arbitrary and capricious.

SUMMARY

The new point system adopted by the Commission to select among competing applicants for NCE FM stations is designed to ensure that government-affiliated applicants continue to completely dominate the noncommercial airwaves while religious networks such as AFA are assured that their already Lilliputian market share is shrunk even further. The content and weighting of the point system, by design and effect, creates an unmistakable bias in favor of government applicants such as state universities, which already enjoy an overwhelming dominance of the market share, while severely crippling private religious networks such AFA. Indeed, the new standards could just as well have expressly stated that AFA will never again be granted a license, that it will be required to forfeit thirty-nine (39) licenses it currently possesses, and that NPR affiliates will always prevail against religious networks, because this is precisely what occurs when the new standards are applied. Such religious gerrymandering is both unconstitutional and arbitrary and capricious.

Although the public welfare is best served by "the widest possible dissemination of information from diverse and antagonistic sources,"[1] implementation of the new rules guarantees not diversity of viewpoints, but almost total uniformity. The point system is structured such that there are seven (7) possible points. *See* Exhibit 1 attached, *Report and Order*, FCC 00-120 (2000), at App. A (summary of point system). An applicant can score two (2) points for either ownership diversity or for participation in

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[1] *Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 192 (1997) (internal quotations and citations omitted).

a statewide educational network, up to two (2) points for technical superiority, and three (3) points for "localism." In the event of a tie, the applicant with the fewest existing stations wins, or, if the number of stations is equal, the applicant with the fewest pending applications wins. *Id.*

By assigning the greatest number of points to "localism" and defining governments as "local,"[2] the FCC has designed the rules to ensure that government networks will almost always win over private religious networks. In those rarest of occasions when a private religious network ties with an NPR affiliate, the Commission designed the tie-breakers to categorically favor PBS/NPR affiliates because the attribution standards were drafted to exempt programming and funding from government sources such as the Corporation for Public Broadcasting ("CPB")[3] The inevitable effect of these rules is to ensure that NPR affiliates, which already dominate the market (reaching by their own estimate approximately 91% of the national audience)[4], receive most of the new licenses.

The new point system should therefore be stricken as a violation of the equal protection component of the Fifth Amendment as well as the Free Speech, Free Exercise and Free Press clauses of the First Amendment or, alternatively, as a violation of the Administrative Procedures Act.

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[2] By definition, governments are "local throughout the area within which their authority exists." *See Report and Order*, FCC 00-120 (2000), attached hereto as Exhibit 1, at ¶ 54.

[3] As the FCC knew when adopting the new rules, AFA has the most existing stations and the second most applications. *See* Exhibit 2 attached, affidavit of Donald E. Wildmon, at ¶¶ 3, 6. In fact, the top five and eight of the top ten license holders are religious networks. *Id.*

[4] *See* Joint Comments of NPR, APTS and CPB at Exhibit 1.

ARGUMENT

The new standards were adopted after a six (6) year period during which the Commission froze ongoing comparative cases pending establishment of new criteria. During this period, mutually exclusive NCE FM applications accumulated unresolved. *See* Ex. 1 at ¶ 2.[5] As the Commission knew when adopting the point system, AFA has 118 mutually exclusive applications pending, of which thirty-nine (39) are for upgrades to existing translator stations. *See* Petition at ¶ 40. Under the new standards, AFA would lose every single application, including loss of all 39 translators. Thus, upon application of the new rules, AFA will promptly lose 39 of its existing 181 stations on the air, a 21.5% reduction, gain no new stations and, assuming others continue to file mutually exclusive applications against it, AFA will eventually lose all of its remaining translators, resulting in an additional reduction of approximately 32% of its network. Moreover, AFA will essentially be estopped from ever acquiring another new license, assuming only that someone files a mutually exclusive application. Other religious networks will suffer a similar fate.

Armed with full knowledge of the characteristics of the mutually exclusive applicants for the 615 broadcast licenses currently at issue, the FCC knew in advance how the point system would affect the applicants. The new standards are nothing less than a "heads NPR wins, tails religious networks lose" approach to assignment of new

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[5] The new standards will affect the issuance of some thirty (30) new NCE television licenses and approximately 615 NCE FM broadcast licenses currently subject to mutually exclusive applications. *See* First Amended Petition for Review ("Petition") at ¶ 12.

licenses. Couching the categories in terms of "localism" and "statewide-educational networks" is a pretext; the FCC prefers the oldest and largest network, NPR. *Cf. Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 553-54 (1990) (upholding FCC preferences for minority ownership in part because they "serve geographically limited markets with relatively small audiences").

Rather than simply saying so outright (which would obviously be impermissible), the Commission sought to conceal its bias by dubbing government-owned NPR affiliates "local" and weighting the points in such a manner as to ensure that NPR affiliates would always win. The one is no more legitimate than the other. *See, e.g., NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984) ("however neutral the government's intentions in enacting a law, the operation of that law may have a vastly uneven impact. There is no equality in a law prohibiting both rich and poor from sleeping under the bridges of Paris.") (alluding to the famous aphorism of Anatole France); *see also Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring) (same).

I. STANDARD OF REVIEW

As this Court has recently observed, "strict scrutiny must be applied to regulations that target a small subset of media organizations in ways that threaten to 'distort the market for ideas.'" *Bell South Corp. v. FCC*, 144 F.3d 58, 68 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1086 (1999) (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 660 (1994) (*Turner I*)). "Regulations that discriminate among . . . different speakers within a single medium, often present serious First Amendment concerns." *Turner*

I, 512 U.S. at 659 (citing *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585, 591-592 (1983)). And where, as here, government regulations are structured in such a curious manner, they "raise[] suspicions that their objective was, in fact, the suppression of certain ideas" even absent direct evidence of illicit government motive. *Id.* at 660 (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228-229 (1987)). Strict scrutiny is therefore the appropriate standard of review here.

Alternatively, because AFA's claims "lie at the intersection of the First Amendment's protection of free speech [and free exercise and free press] and the Equal Protection Clause's requirement that government afford similar treatment to similarly situated persons," they must at least be scrutinized "under a test more stringent than the 'minimum rationality' criterion typically used for conventional economic legislation under equal protection analysis." *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 801, 804 (D.C. Cir. 1988) ("even in broadcast regulation the First and Fifth Amendments demand a better fit between the law and its asserted legitimate purposes"). "Where legislation affecting speech appears underinclusive, i.e., where it singles out some conduct for adverse treatment, and leaves untouched conduct that seems indistinguishable in terms of the law's ostensible purpose, the omission is bound to raise a suspicion that the law's true target is the message." *Id.* at 804-805; *see also Community-Service Broadcasting v. FCC*, 593 F.2d 1102, 1122 (D.C. Cir. 1978) (en banc) ("where non content-based distinctions are drawn in a statute affecting First Amendment rights, the Supreme Court has held that the government interest served must be 'substantial' and the

statutory classifications 'narrowly tailored' to serve that interest if the statute is to withstand equal protection scrutiny").

Under either standard, the new point system is unconstitutional.[6]

II. THE NEW RULES CONSTITUTE RELIGIOUS GERRYMANDERING

Courts "must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664 at 696 (Harlan, J., concurring). The FCC's new point system reapportions applicants for NCE FM stations in so highly irregular a fashion that it cannot be understood as anything other than an effort to ensure that NPR retains its complete dominance, and that AFA and the other religious networks get no more licenses and even lose a considerable number of licenses they presently hold. Such discriminatory apportionment violates the equal protection component of the Fifth Amendment's Due Process clause,[7] as well as the Free Speech, Free Exercise and Free Press[8] clauses of the First Amendment.

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[6] Indeed, as demonstrated *infra*, the new point system is arbitrary and capricious, and cannot withstand even rational basis scrutiny.

[7] *See, e.g., Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 542 n.2 (1983) ("The Due Process Clause imposes on the Federal Government requirements comparable to those that the Equal Protection Clause of the Fourteenth Amendment imposes on the States.").

[8] AFA has its own news department, furnishing daily reports on breaking news nationwide from a distinctly different perspective than the NPR news slant. *See* Petition at ¶¶ 7, 38. "[N]ews communicated to

(Continued on following page)

The religious gerrymander here, like that in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993), requires that the real object of the rules be discerned not from the bare text, but rather from their actual effect.

> Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause forbids subtle departures from neutrality, *Gillette v. United States*, 401 U.S. 437, 452 (1971), and covert suppression of particular religious beliefs, *Bowen v. Roy*, [476 U.S. 693 (1986)] at 703 (opinion of Burger, C. J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.

Id. at 534 (internal editing marks omitted); *see also Shakman v. Democratic Org. of Cook County*, 481 F. Sup. 1315, 1331 n.13 (N.D. Ill. 1979) ("The promise of equal protection of the laws is not limited to the enactment of fair and impartial legislation, but necessarily extends to the application of these laws."). The FCC's new standards, like the ordinances in *Lukumi*, disclose an object remote from legitimate concerns and work an unmistakable religious gerrymander across the nation's noncommercial frequencies. This effect renders the standards unconstitutional.

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the public is subject to selection and, through selection, to editing, and that in addition there may be diversity in method, manner and emphasis of presentation." *Scripps-Howard Radio*, 189 F.2d at 683. By design and effect, the FCC's new standards will eliminate the introduction of AFA's news and programming into new markets and increase the existing NPR dominance, in violation of the demands of free press.

Examining the effect of the new point system on the frozen applications, whereby NPR affiliates are preferred over religious networks, it is clear that the Commission has impermissibly chosen "among applicants upon the basis of their political, economic or social views."[9] *National Broadcast Co. v. United States*, 319 U.S. 190, 226 (1943) (Frankfurter, J.) (noting that "Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis."). Contrary to the dictates of both the Communications Act and the First Amendment[10], the FCC has established the government-funded views of NPR as the overwhelmingly dominant view in public broadcasting. *Cf. Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969) ("There is no question here of . . . the official government view dominating public broadcasting. *Such questions would raise more serious First Amendment issues.*") (emphasis added); *see also Metro Broadcasting, Inc. v. FCC*, 497 U.S. 617 (1990) (O'Connor, J., dissenting) ("the Court has never upheld a broadcasting measure designed to amplify a distinct set of views or the views of a particular class of speakers. Indeed, the Court has suggested

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[9] As the Commission has itself noted, CPB and other sources of government funding "fund specific types of programs they wish to see increased." *See* REVISION OF PROGRAM POLICIES AND REPORTING REQUIREMENTS RELATED TO PUBLIC BROADCASTING LICENSEES, 98 FCC 2d 746 (1984). Rules that favor government-funded stations, then, favor particular political, economic and social views.

[10] *E.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) ("in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978), we deemed the policy of promoting the widest possible dissemination of information from diverse sources to be consistent with both the public-interest standard and the First Amendment").

that the First Amendment prohibits allocating licenses to further such ends.").

The FCC has adopted standards that decimate the goal of diversified programming, and instead ensure homogeneous programming and viewpoint as determined by government-funded entities such as NRP and CPB. *Cf. Bechtel v. FCC*, 957 F.2d 873, 875 (D.C. Cir. 1992) (noting that in its 1965 POLICY STATEMENT ON COMPARATIVE BROADCAST HEARINGS "the Commission defined the public interest in terms of two broad objectives: providing the 'best practicable service to the public' and securing the 'maximum diffusion of control of the media of mass communications' "); *see also* Statement of Chairman Kennard in *Biennial Review Report*, FCC 00-191 (2000) ("in a participatory democracy, it is vitally important that we encourage the widest possible dissemination of this [news and pubic affairs] information *from diverse and antagonistic sources*") (emphasis added). The new standards should therefore be stricken.

III. THE POINT SYSTEM INVARIABLY FAVORS NPR AFFILIATES

Under the new point system, an applicant can score two (2) points for either ownership diversity (i.e. not having another station in the listening area), or for a statewide educational network (which by design is available only to a government entity in all but the rarest of cases), but not both; one (1) or two (2) points for technical superiority; and three (3) points for "localism."

Points for technical superiority require that an applicant's proposal cover an area at least 10% greater *and* reach a population at least 10% greater than the next best

proposal in order to merit one (1) point. In order to receive two (2) points for technical superiority, an applicant must reach both an area and a population 25% greater than the next best proposal. *See* Report and Order at ¶ 39. These points will accordingly rarely be awarded, especially where the applicants had no advance notice that technical superiority would prove so important. As a result, the license will most often be decided on the basis of a five (5) point maximum scale.

An award of three (3) points for "localism" under these circumstances becomes an even more significant factor. In light of the fact that most NPR affiliates also qualify as statewide networks (for which they receive an additional two points), the government-funded applicant will routinely win the license. Private non-local entities such as AFA, even if they were fortunate enough to garner the full two (2) points for technical superiority, can only hope to collect four (4) points: two for diversity of ownership and two for technical superiority. The determinative "localism" credit is by definition available only to governments and truly local entities.[11] Thus, NPR affiliates, with their five (5) points, will always trump even a technically superior private network such as AFA, that can garner no more than four (4) points.[12]

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[11] Under the standards, "established local applicants" are "[t]hose physically headquartered, having a campus, or having 75% of board members residing within 25 miles of the reference coordinates of the center of the proposed community of license." *Id.* at ¶ 54.

[12] AFA will also lose to other religious networks, because under the first tie-breaker, AFA has more existing stations than anyone else. *See* Ex. 2 at ¶ 3.

A. The Heavy Weighting of the Localism Credit is Irrational

The FCC assertedly based its weighting of the localism credit on the ground that it had previously adopted localism as the most determinative factor in the Instructional Television Fixed Service ("ITFS") arena. *See* Report and Order at ¶ 46. But there are striking differences between instructional television and FM radio services. For instance, ITFS can be used *only* by schools, and can be transmitted *only* to classrooms. *See* 46 CFR § 74.901. The only permissible uses of ITFS are instructional courses, in-service faculty training, and school administration. *See* 46 CFR § 74.931. By contrast, NCE FM stations serve the community at large, they are routinely heard in the listeners' cars and homes, and address a broad spectrum of community needs. *See, e.g.*, Application of Iowa State University of Science and Technology ("ISU") for Perry, IA station, excerpts of which are attached hereto as Exhibit 3 (describing range of programming offered).

ISU's programming description also exposes the duplicity of the Commission's preference for "educational" entities. *See* Report and Order at ¶¶ 41-54 (asserting that "education is essentially a local undertaking;" stating preference for "local *educational* presence;" and affirming "the unique role of locally based entities providing NCE local educational programming"). Regardless of its stature as an educational institution, ISU's broadcast stations air programming of the same general nature as private religious networks such as AFA (i.e., music, news, and the like). ISU's programming is no more "educational" in the narrow sense in which the Commission uses the term than AFA's.

The Commission, however, believes otherwise. In the recent case of *WQED Pittsburgh and Cornerstone Television, Inc.*, 19 CR 214 (1999), the Commission set forth "additional guidance" concerning "educational" programming. It stated: "programming primarily devoted to religious exhortation, proselytizing, or statements of personally-held religious views and beliefs generally would not qualify" as educational programming. *Id.* at ¶ 44. The FCC further stated that "church services generally will not qualify as 'general educational' [programming] under our rules." *Id.* at n.81.

Although the FCC subsequently withdrew the additional guidance (by a 3-2 vote) in response to overwhelming public and congressional protests, led in large part by the AFA, it did not disavow the views concerning religious programming expressed therein. At least one Commissioner strenuously objected to the withdrawal. *See WQED Pittsburgh and Cornerstone Television, Inc. Order on Reconsideration*, FCC 00-25 (2000) ("This is a sad and shameful day for the FCC.... [T]his supposedly independent agency has capitulated to an organized campaign of distortion and demagoguery.... In a religiously diverse society, sectarian religious programming, by its very nature, does not serve the 'entire community' and is not 'educational' to its non-adherents.... I, for one, will continue to cast my vote in accordance with the views expressed in the additional guidance and in this statement.").[13] Additionally, Chairman Kennard described the

[13] The timing of the *WQED* decision, Commissioner Tristani's comments and the Report and Order raise the question of retaliation by the Commission against AFA and the other religious broadcasters for their role in overturning *WQED*. Of course, AFA is unable to ascertain the exact motives of the Commissioners.

WQED decision as not establishing new rules at all, "but simply clarif[ying] long-standing FCC policy applicable to any broadcaster seeking to use an NCE-reserved channel." *See* Exhibit 5, Letter from Chairman William E. Kennard to Representatives Oxley, Pickering, Stearns and Largent, dated Jan. 20, 2000.

B. Credit for Diversity of Ownership is Nullified by Credit for Participation in a "Statewide Educational Network"

The two points for diversity which most religious networks such as AFA would usually receive (because, unlike most government-owned NPR affiliates, they have no other station heard in the listening area) have been effectively nullified by the two points awarded to "statewide educational networks" – despite the fact that such statewide networks are often already fully licensed and able to reach virtually all of their intended audience without a new station. Indeed, the Commission expressly stated that government-owned NPR-type affiliates would not be disadvantaged by the diversity credit "because, if they did not qualify for the local diversity credit, they could likely qualify for an equal credit as a state-wide network." *See* Report and Order at ¶ 34.

The Commission acknowledged that the diversity credit served the "critical" purpose of "reflecting a variety of viewpoints from different sources." *Id.* at ¶ 33. Yet the Commission apparently concluded that diversity of viewpoints is a goal worthy of pursuit only insofar as it does not involve a government-owned NPR affiliate. The offset two point credit for a statewide network effectively rewards an applicant for *not* reflecting a variety of viewpoints from different sources. Rather, an applicant is given

two points precisely because it is part of a network offering a uniform viewpoint determined (in most cases) by a distant bureaucracy[14]. The two points for a statewide network may be procured whether or not the applicant already has a station in the listening area, and whether or not it intends to broadcast programming different from its existing station. Thus, a government-owned NPR affiliate will receive the statewide network credit even when it certifies that it seeks to broadcast programming identical to what it already broadcasts to the same audience, despite the fact that a religious network whose voice is otherwise unheard is the only other applicant for the license (as is the case in ISU's Perry application).[15]

The FCC rationalizes the statewide network credit on the premise that absent such a credit, an entity such as a state university system "might not be able to effectively compete" in a point system. *Id.* at ¶ 56. In fact, as the maps attached to Exhibit 2 demonstrate, the state university systems not only effectively compete, they dominate in the noncommercial field. The state universities in Iowa,

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[14] In fact, the Commission explicitly rejected the suggestion that it award points for locally-originated programming, stating that the record "provides no basis for departure" from its long-standing policy of affording full-power licensees "maximum flexibility" in selecting programming. *Id.* at ¶ 66.

[15] After discussing the numerical limitation for statewide networks and struggling with the decision whether to limit the credit to government supported networks only, the Commission determined to place the number at five full-time campuses operated by an accredited school. *Id.* at ¶¶ 56-58. The FCC did so in order to allow a single private institution that had exactly five campuses to qualify for the credit. *Id.* at ¶ 57. But even this private entity would lose to a government-owned NPR affiliate, because the NPR affiliate would receive 3 points for localism and the private school would not.

for example, broadcast their NPR programming to every square inch of the state, sometimes on no less than five (5) different stations at once. *See id.* (Iowa City and Dubuque each are served by five different NPR affiliated stations). Concern for the advancement of state universities and their broadcast stations does not comport with reality.

C. The Attribution Rules Intentionally Exclude NPR Affiliates

The new attribution rules operate to penalize private religious networks such as AFA whenever they provide 15% of the programming and 33% of the funding to an applicant. *See* Report and Order at ¶ 79. However, NPR affiliates, which on average receive over 40% of their programming from the national headquarters and 40% of their funding from the government sources such as CPB[16], are expressly exempted from the attribution rules. *See* Report and Order at ¶ 79 (the new attribution standards should not have any impact on "traditional" NCE funding and programming relationships, "because traditional sources of NCE funding (*such as the Corporation for Public Broadcasting*, financial institutions, and major donors) and of NCE programming, (*such as the Public Broadcasting Service*) are not generally broadcast licensees and thus will have no broadcast interests to attribute") (emphasis added).

Although the FCC asserted that these new attribution standards were "consistent with the attribution standards

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[16] *See* Exhibit 4, CPB's summary of hours of radio programming by sources, as reported on their website at www.opb.org/research/faq/general/faqp.6 [sic].

applied to commercial broadcasters," *id.*, in truth, they differ in one critical respect. The attribution standards applicable to commercial broadcasters emphasize *actual control*: control of all network licenses is attributed to the entity supplying the money and programming (normally the network). *See* 47 U.S.C. § 73.3555. Under the new standards applicable to NCEs, however, control of all network licenses is attributed *not* to the network providing money and programming, but to the *local licensee*.

The normal structure of religious networks leaves no question that the network controls the station, providing both the funding and the programming. However, financial and programming relationships between government funded entities such as the CPB, NPR and their affiliates will *not* result in attribution of control, because, as the FCC was fully aware, neither CPB nor NPR hold licenses and thus escape treatment as a network under the attribution rules. The Commission has thus ensured that every avenue that a religious network might take to obtain a license is cut off.

This differential treatment of similarly situated entities violates the Fifth Amendment equal protection rights of AFA and other religious networks.

D. The Tie-Breakers Favor NPR Affiliates

Under both the primary and secondary tie-breakers, NPR affiliates will win against religious network affiliates because of the curious design of the attribution standards.[17]

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[17] In fact, the secondary tie-breaker was proposed by NPR. *See* Report and Order at ¶¶ 71 n.57 and 73.

All attributable stations count against an applicant under the tie-breakers. *Id.* at n.59. Moreover, with the tie-breakers, the FCC studiously ignored the fact that although AFA and other religious networks may have more *stations* than other applicants, they cover a smaller *population*[18] than do most NPR affiliates, which upon information and belief are located in all but one of the top 100 rated Nielsen markets nationally.

The rationale offered by the Commission for the tie-breaker rules once again ignores reality. The Commission claimed that "the public should have the opportunity to receive service from the applicant who has the fewest existing outlets to express a particular viewpoint." *Id.* at ¶ 72. Although a given state university may have fewer "outlets" to express the NPR viewpoint than a religious network, the NPR network itself is much, much larger than all religious networks combined, and its viewpoint already inundates the airwaves.

Consequently, the tie breakers, too, are a sham, revealing a distinct bias in favor of the dominant entities such as NPR.

E. The Actual Effect of the New Standards in Iowa Demonstrate Their Discriminatory Intent

The manner in which the new standards operate to favor government-funded NPR affiliates over private

[18] AFA reaches only approximately 3.8% of the population. *See* Petition at ¶ 14.

religious networks such as AFA can best be understood by examining their effect in a concrete situation.

NPR programming currently blankets the State of Iowa via twelve (12) NPR stations and their translators. Anyone in Iowa with a radio can receive at least one NPR station. *See* Ex. 2 at ¶ 9; *see also* map attached to Ex. 2 (illustrating NPR coverage). AFA, on the other hand, is currently heard on only two small translator stations. *Id.* at ¶ 7. AFA has thirteen (13) pending mutually exclusive applications for new full-power stations in Iowa. *See* Ex. 2 at ¶ 8. Two were filed to protect the existing translator stations, which have been blocked by NPR affiliates. *Id.* at ¶ 13. AFA also has a pending application for Kewanee, Illinois, that is blocked by an application for yet another Iowa NPR station. *Id.* at ¶ 14.

In 11 of the 13 locations which AFA has filed for Iowa stations, a government-owned NPR affiliate has filed a mutually exclusive application. *Id.* at ¶ 10. In 9 of its 13 applications, AFA was the first to file.[19] *Id.* at ¶ 8. In every case, the government-owned NPR affiliate outscores AFA under the new point system and so will be granted the license.

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[19] The Commission went full circle on whether to institute a "finder's preference" for applicants locating new frequencies. In its initial Notice of Proposed Rulemaking, the Commission specifically asked whether such a credit should be given, implicitly recognizing the value of such action. *See* 7 FCC Rcd 2664 at ¶ 10 (1992). In the Further Notice, the Commission indicated that it was considering using the "finder's preference" as a tie breaker. *See* Report and Order at ¶ 69. However, in their final form, the new rules not only fail to give any credit to the first to file, they effectively penalize the entity most often the first to file, namely the AFA.

In Perry, Iowa. AFA filed for a full-power station. Three NPR stations already cover Perry. *Id.* at ¶ 12. Nevertheless, Iowa State University filed a mutually exclusive application for the same frequency sought by AFA. *Id.* Perry is located approximately 20 miles northeast of Des Moines and approximately 30 miles southwest of Ames, where Iowa State is based. *See* attachment to Ex. 2, map of Iowa. Iowa State currently airs NPR programming on its 100,000 watt station, WOI-AM (as well as WOI-FM), in Ames, with a coverage area reaching the entire state. *Id.* In its application for the new Perry station, Iowa State certified that it would run the very same programming Perry listeners already hear on ISU's existing station. *See* Ex. 3. Despite the duplication of services to the identical listening audience, and the lack of AFA programming available to listeners in the Perry area, Iowa State would qualify for five (5) points under the new point system while AFA would receive only two (2).[20]

Operation of the new point system in this instance would thus result in an existing NPR affiliate being awarded a second station fully within the coverage area of an existing station, and the second station simply re-broadcasting the same programming on a new frequency. The truly diverse viewpoint of AFA, however, would be locked out of the market altogether. The goal of diversity of viewpoints is therefore frustrated, and instead uniformity of viewpoint is ensured.

Similar results will occur across the state. In fact, in one instance, a competing NPR affiliate filed a mutually

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[20] Iowa State would receive two (2) points for being part of a statewide network (*see* Ex. 3), and three (3) points for "localism" because it is a government entity. AFA would receive two (2) points for diversity. Neither applicant would receive points for technical superiority because the proposed coverage areas are identical.

exclusive application in Bettendorf for a fifth NPR station, thereby blocking AFA's application for the first noncommercial station in Kewanee, *Illinois* – because the NPR affiliate is deemed "local" under the new rules. *See* Ex. 2 at ¶ 14. Once again, the government-owned NPR affiliate will be awarded the license, and AFA's voice will not be heard at all. The FCC has thus assured that AFA's religious network is stymied, while the "local" government-owned monopoly grows larger and larger – even though the government-owned NPR affiliate will air repetitive programming with the already-dominant viewpoint.

In the State of Iowa, then, the NPR network (which already saturates the state with its programming) will grow from 12 to 24 stations, offering redundant programming, while AFA will lose its two existing translators, and lose all pending applications for full-power stations.[21] Such a result, which will occur across the nation, turns the goal of the Communications Act of 1934 on its head, and renders the notion of diversity of viewpoints a farce.

CONCLUSION

The FCC's new point system discriminates among applicants for new NCE stations, manifesting a bias in favor of the NPR network and against religious networks. NPR affiliates, by fiat, are declared "local" when they are not. NPR affiliates are exempted from the new attribution rules although they are similarly situated to religious networks. And NPR affiliates are rewarded for being part of a "statewide

[21] In the other mutually exclusive applications involving government-owned NPR affiliates, the NPR affiliates will outscore the religious networks. AFA has been unable to identify even one instance in which the government-owned NPR affiliates will lose a single application in Iowa.

network" when religious entities are penalized for being part of a national network. Every avenue of successful application by a religious network for a new license was anticipated, and then removed, by the FCC. The effect of the new rules is no mere by-product of a neutral effort at rulemaking – it is the intended object of a calculated effort to discriminate. The new rules thus constitute religious gerrymandering, and should be declared unconstitutional by this Court.

WHEREFORE, Petitioner prays for entry of an order declaring the new point system unconstitutional, and for such other and further relief to which it may be entitled.

Respectfully submitted,

AMERICAN FAMILY
ASSOCIATION, INC.

/s/ Stephen M. Crampton
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Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FAMILY ASSOCIATION, INC.,	:	**CASE NOS.**
Petitioner	:	**00-1310**
	:	**00-1246**
v.	:	**00-1255**
FEDERAL COMMUNICATIONS COMMISSION and **UNITED STATES OF AMERICA,**	:	
Respondents.	:	

AFFIDAVIT OF DONALD E. WILDMON

Donald E. Wildmon, being duly sworn, upon oath deposes and states as follows:

1. I am founder and President of American Family Association, Inc. (AFA).

2. AFA operates American Family Radio with the special purpose of broadcasting news and current affairs from a Christian and conservative perspective that is generally unavailable from the commercial networks and National Public Radio (NPR). AFA employs 17 journalists to provide network news and information services for radio, Internet, and print media, in addition to the local coverage provided by each of its radio station managers.

3. AFA currently holds 138 primary noncommercial educational FM (NCE-FM) radio station authorizations, more than any other licensee. However, these stations are generally located in smaller communities so that the aggregate population reached by all of AFA's stations is less than the coverage of a single metropolitan NPR

station, such as KUSC-FM in Los Angles or WFUV-FM in New York City.

4. Religious networks hold the largest numbers of NCE-FM licenses. Ranked by number of authorizations, the top five (5), and eight (8) of the top ten (10) NCE-FM licensees are religious networks.

5. The party with the largest number of NCE-FM applications is Broadcasting for the Challenged (BFTC). BFTC has no existing stations and filed no original applications, but rather filed 148 copycat applications. BFTC filed 51 copycat applications on frequencies found by AFA. AFA will lose every one of those applications because ties go to the applicant with fewer stations. BFTC states in its applications that it will use radio to teach sign language to the deaf.

6. Ranked according to the number of pending NCE-FM applications, AFA is second after BFTC, followed by four (4) other religious networks.

7. In Iowa, AFA is currently building new primary NCE-FM stations in Mason City and Burlington and operates satellite-fed translators in Ottumwa and Creston, Iowa.

8. On nine (9) of AFA's thirteen (13) blocked NCE-FM applications in Iowa, AFA was first to file.

9. NPR programming blankets the State of Iowa via twelve (12) existing NPR stations and their translators. Anyone in Iowa with a radio can receive at least one NPR station.

10. NPR affiliates have filed applications for twelve (12) new stations in Iowa, and in each case the NPR affiliate will win under the new point system. The twelve

(12) new NPR stations will not reach a single Iowan who cannot already receive one or more NPR stations. Eleven (11) of those twelve (12) applications are in conflict with AFA applications.

11. Four NPR stations currently serve Cedar Rapids, Iowa. Two additional Cedar Rapids NPR stations will be authorized if the new comparative standards are implemented. AFA has applied for its first station to serve Cedar Rapids, but under the new comparative criteria, it will be denied in favor of a fifth NPR station.

12. Three NPR stations currently cover Perry, Iowa. When AFA applied for its first station to serve Perry, Iowa, a competing NPR application was filed that blocked it. Under the new comparative criteria, AFA's Perry application will be denied, in favor of a fourth NPR station.

13. An AFA translator and two NPR stations and currently serve Ottumwa, Iowa. When AFA applied to replace its Ottumwa translator with a primary station capable of originating local programming, it was blocked by an NPR application. Applications for NPR stations were then filed on each of the two other available frequencies in Ottumwa. Under the new comparative criteria, Ottumwa will lose its AFA translator and have five NPR stations.

14. When AFA filed an application to build the first NCE-FM station for Kewanee, Illinois, the University of Northern Iowa ("UNI") blocked it by filing a mutually exclusive application to provide the fifth NPR station covering Bettendorf, Iowa. Under the new point system, AFA and Kewanee, Illinois, will lose.

15. The major NPR affiliates in Iowa are Iowa State University and the University of Northern Iowa. Both of these institutions are governed by the Board of Regents of the State of Iowa, comprised of nine (9) members, none of whom live in the southern or western portions of the state. These NPR affiliates get three (3) points for "localism" everywhere in the state, although none of their applications would meet the "localism" residence requirements imposed on non-governmental applicants.

16. In every instance where AFA is in competition with a governmental entity that is an NPR affiliate, AFA will be denied the license in favor of the NPR applicant because the new rules define them as "local" and they are not penalized for redundancy.

17. The attached map is an accurate representation of the coverage of existing NPR stations in Iowa and pending applications of new NPR stations in Iowa. NPR stations located in surrounding states also reach into Iowa. The map does not attempt to show that redundant coverage.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31st day of August, 2000.

/s/ Donald E. Wildmon
DONALD E. WILDMON

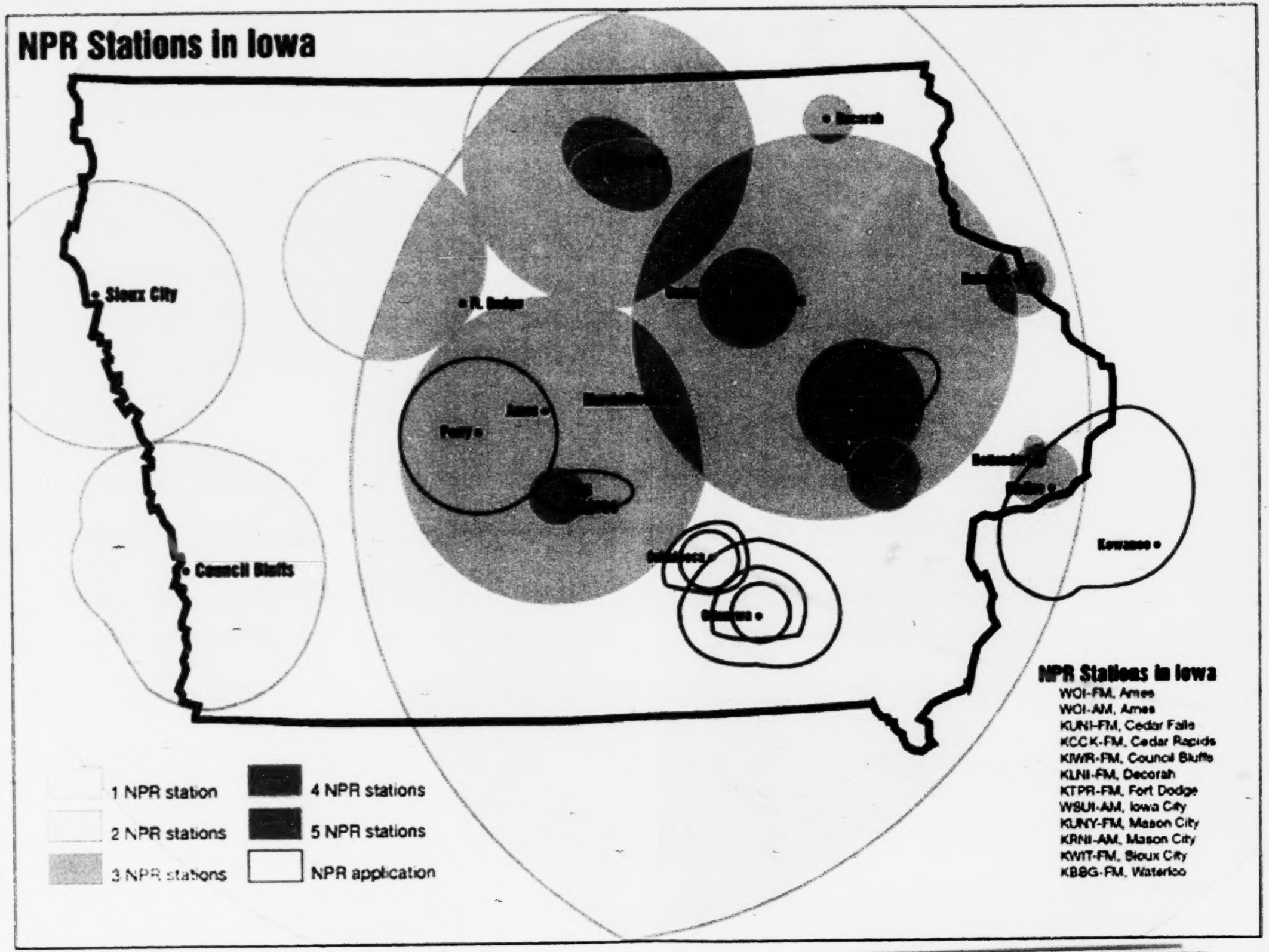
Sworn to and subscribed before me this the 31st day of August, 2000.

/s/ Patricia Gail Richardson
NOTARY PUBLIC

My Commission Expires:

August 6, 2004

Notary Public State of Mississippi At Large
My Commission Expires:
August 6, 2004
Bonded Thru Heiden, Brooks & Garland, Inc.



BEST AVAILABLE COPY

FCC 340

APPLICATION FOR CONSTRUCTION PERMIT FOR NONCOMMERCIAL EDUCATIONAL BROADCAST STATION
(Carefully read instructions before filling in form)
Return only form to FCC

Section 1 – GENERAL INFORMATION

For Commission Use Only
BPED-0151215LIE
File No.

Name of Applicant		
Iowa State University of Science and Technology		
Street Address or P.O. Box		
Communications Building		
City	**State**	**Zip Code**
Ames	IA	50011
Telephone No.		
515-294-2025		

Name		
Rick Lewis		
Street Address or P.O. Box		
Iowa State Univ. 204 Communications Building		
City	**State**	**Zip Code**
Ames	IA	50011
Telephone No.		
515-294-5555		

2. This application for: ☐ AM ☒ FM ☐ TV

(a) Channel No. or Frequency	(b) Principal Community	City	State
219		Perry	IA

(c) Check one of the following boxes:

☒ Application for NEW station

* * *

3. Is the application mutually exclusive with a renewal application? ☐ Yes ☒ No

*With a copy to: Margaret L. Miller, Esq. Dow,
Lohnes & Albertson
1255 23rd Street, N.W.,
Washington, DC 20037
202-857-2571

FCC FORM 340
Perry FM
December, 1995

EXHIBIT I

ADVANCEMENT OF EDUCATIONAL PROGRAMS

The proposed station will advance the educational program goals of Iowa State University of Science and Technology ("ISU") by extending the program service of Station WOI(AM), Ames, Iowa to the Perry area. The WOI Mission Statement reads, in part, that WOI Radio "is a public radio organization which seeks to make Iowa a better place to live through production and broadcasting of news, public affairs, arts and entertainment programs."

As the licensee of noncommercial educational station WOI-FM as well as WOI(AM), ISU has clearly demonstrated its commitment to, and capability of, providing valuable educational programming. The proposed Perry station, operating as a satellite of station WOI(AM), will provide a full range of news and public affairs programs, as well as a substantial amount of performing arts, as identified in the typical program schedule attached (Exhibit V). In ongoing development of the schedule, WOI staff will regularly consult with a Community Advisory Board and aggressively seek out diverse opinions throughout the community to identify specific programs for broadcast use.

ISU considers this programming to be an important part of the overall educational mission of a land grant university. "With an institutional emphasis upon areas related to science and technology, the University carries out its traditional mission of discovering, developing, disseminating, and preserving knowledge." (ISU Statement of Mission, 1989)

Listeners have long expressed eagerness for improved reception of the AM service to the south and west of Ames, especially during hours of low-power, directional operation. The proposed station will contribute greatly to addressing this concern.

WOI AM 640

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	
5	BBC World Services	BBC World Service					BBC World Service	5
6		NPR Morning Edition Marketplace at 6:50 am News with Todd Mundt						6
7							Only a Game	7
8	NPR Weekend Edition						NPR Weekend Edition	8
9								9
10								10
11	CBC Sunday Morning	Talk of Iowa with Don Forsling					Whad'ya Know with Michael Feldman	11
		BBC News/Outlook						
12		The Book Club with Doug Brown						12
1	Car Talk	Midday with Todd Brown and Doug Cooper					Only a Game	1
2	A Prairie Home Companion	NPR's Talk of the Nation					Weekly Edition	2
							Bridges	
3	Thistle & Shamrock	NPR'S All Things Considered					Sound Money	3
4	ATC						ATC	4
5	One Night Stand						Rabbit Ears Radio	5
6	Riverwalk Live from the Landing	Marketplace					Jazzset	6
		BBC World Service						
7	Portraits in Blue	CBC As it Happens					Jazz Revisited	7
							Billy Taylor's Jazz at Kennedy Center	
8	Wynton Marsalis' Making the Music	Spoken Word Specials (National Press Club, Live from Prairie Lights)					Stage & Screen	8
9	BBC World Service	BBC World Service					BBC World Service	9
10								10
11								11
12								12

General Public Broadcasting Information

- *What are the principal sources of programming?*
- *How many public radio and television stations are there?*
- *Who runs the stations?*
- *Do people value public broadcasting?*
- What's on public radio and public television?
- *What are the listener's top choices*
- *What are the viewer's top choices?*
- *How many people listen to public radio?*
- *How many people watch public television?*
- *Does United States public broadcasting go beyond national borders?*

What's on public radio and public television?

- Public radio broadcasts a variety of music and other formats. More than half the stations broadcast some classical, jazz, folk, and world music formats. The majority of non-music hours broadcast are news and information.
- Public television stations devote over one fourth of their broadcast hours to programming for children. Information and skills, public affairs, and news account for nearly half of the broadcast hours.

Hours of Radio Programming by Sources

Local	47%
NPR	24%
PRI	20%
Other	10%

Hours of Television Programming by Sources	
Local	5%
PBS	63%
Regional public TV organizations	25%
Other	8%
Percentage of Radio Hours Broadcast	
News and information	30%
Other non-music	7%
Music:	
Classical	34%
Jazz	15%

http://www.cpb.org/research/faq/general/faqp6.html

[SEAL]
OFFICE OF THE
CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON

January 12, 2000

The Honorable Michael G. Oxley
U.S. House of Representatives
2233 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Oxley:

This responds to your letter of January 6, 2000, regarding the Commission's recent decision approving the application for assignment of license of WQEX(TV) Channel 16, Pittsburgh, PA, from WQED Pittsburgh to Cornerstone TeleVision, Inc., and the application for assignment of license of WPCB-TV. Channel 40, Greensburg, PA. from Cornerstone to Paxson Pittsburgh License, Inc. (In short, Cornerstone sought and was granted authority to move from Channel 40 to Channel 16, and to sell Channel 40 to Paxson.)

Three salient points stand out in this decision:

- The FCC granted the Cornerstone application, and denied the petitions of those who sought to block the deal based on the religious nature of some of Cornerstone's programming.

- The standards used by the Commission to determine whether a broadcaster qualifies for a reserved noncommercial educational ("NCE") television channel do not apply to the large majority of television broadcasters offering

religious programming because they use channels that are not reserved for NCE stations, *i.e.*, commercial channels.

- In a small number of cases, religious-oriented broadcasters have requested that they be certified as NCE TV broadcasters and thereby they become subject to the standards of an NCE TV station. These standards, however, never operate to prohibit the airing of any particular noncommercial programming, religious or otherwise.

The FCC Granted the Application

This matter arose out of cornerstone's application to acquire the license of Channel 16, one of two stations in Pittsburgh expressly reserved for NCE stations. Opponents of the transaction claimed that Cornerstone intended to use the channel for religious programming that did not qualify as educational. The FCC rejected these arguments and granted Cornerstone's application. The FCC stated that certain programming dealing with religious matters can also be deemed educational and thus satisfy the eligibility requirements for NCE channels.

The NCE Standards Apply Only When NCE Certification is Requested, and Do Not Apply to Most Religious Broadcasters

Since 1952, the Commission has reserved a limited number of television channels for educational broadcasters, including Channel 16 in Pittsburgh. Indeed, Congress has, from time to time, directed the Commission not to diminish the

number of channels reserved for NCE use.[1] In granting Cornerstone's application, the Commission clarified the requirements that apply to Cornerstone and any other broadcaster, religious or otherwise, seeking Commission certification as an educational television broadcaster eligible for a reserved NCE channel. The Commission thus did not single out religious broadcasters, but rather clarified standards applicable to all NCE broadcasters. In fact, the large majority of broadcasters offering religious-oriented programming are exempt from the NCE eligibility requirements described in the Cornerstone decision because they use commercial channels that are not reserved for NCE stations, and thus are not subject to the NCE eligibility requirements.

Cornerstone itself would remain exempt from the NCE requirements as long as it operates on Channel 40 or any other commercial channel. Cornerstone becomes subject to the NCE requirements only by virtue of its decision to move to NCE Channel 16, Cornerstone never contended that it was exempt from the NCE standards due to the religious nature of some of its programming. To the contrary, Cornerstone specifically acknowledged the applicability of, and its intention to abide by, the NCE eligibility requirements that apply to Channel 16.

The Cornerstone Decision Followed Well-Established FCC Policies

Applicants seeking to use NCE-reserved television channels have always been required to demonstrate that their

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[1] See, e.g., Making Further Appropriations For Fiscal Year 1988 And For Other Purposes, P.L. 100-202 (signed Dec. 22, 1987).

programming will be "primarily educational" in nature and thus serve the educational purpose for which the channel was reserved. The Commission's decision in this case therefore does not establish new rules, but simply clarifies long-standing FCC policy applicable to any broadcaster seeking to use an NCE-reserved channel. The decision followed and cited prior Commission decisions in describing what kinds of religious programming would qualify as educational. See, e.g., Way of the Cross of Utah, Inc., 101 FCC2d 1368, 1372, n. 5 (1985).

The NCE Standards Never Prohibit Particular Programming From being Aired Based On Its Religious Nature

Even under this long-established standard, there is no specific programming, religious or otherwise, that is barred from being aired on an NCE channel since the "primarily educational" benchmark applies to the overall program schedule in the aggregate. This means that religious programming of any nature may be aired on an NCE channel, although not all such programming will necessarily count towards the benchmark. Thus, a complaint alleging simply that an NCE broadcaster is airing some religious programming would be summarily dismissed by the FCC since noncommercial programming of any nature is permissible on an NCE channel, as long as more than half of the overall weekly program schedule serves "an educational, instructional or cultural purpose in the station's community of license."

Procedural Issue

I note that these applications are part of an ongoing restricted proceeding under the Commission's ex parte rules, 47 C. F. R. 1.1200, *et seq.* Pursuant to these rules, any presentation directly addressing the merits or outcome of these applications must be served on all parties to the proceeding in accordance with the Commission's ex parte rules. Therefore, in conformity with these rules, we are serving a copy of your letter and this response on the parties to this proceeding.

Text of Order

The text of the WQED/Cornerstone/Paxson decision is available via the Internet on the Commission's web site at: *http://www.fcc.gov/Bureaus/Mass Media/Ordersy/1999/yfcc9939.doc.*

Sincerely,

William E. Kennard
Chairman

(Identical letters were sent to Representatives Chip Pickering, Steve Largent, and Cliff Stearns)